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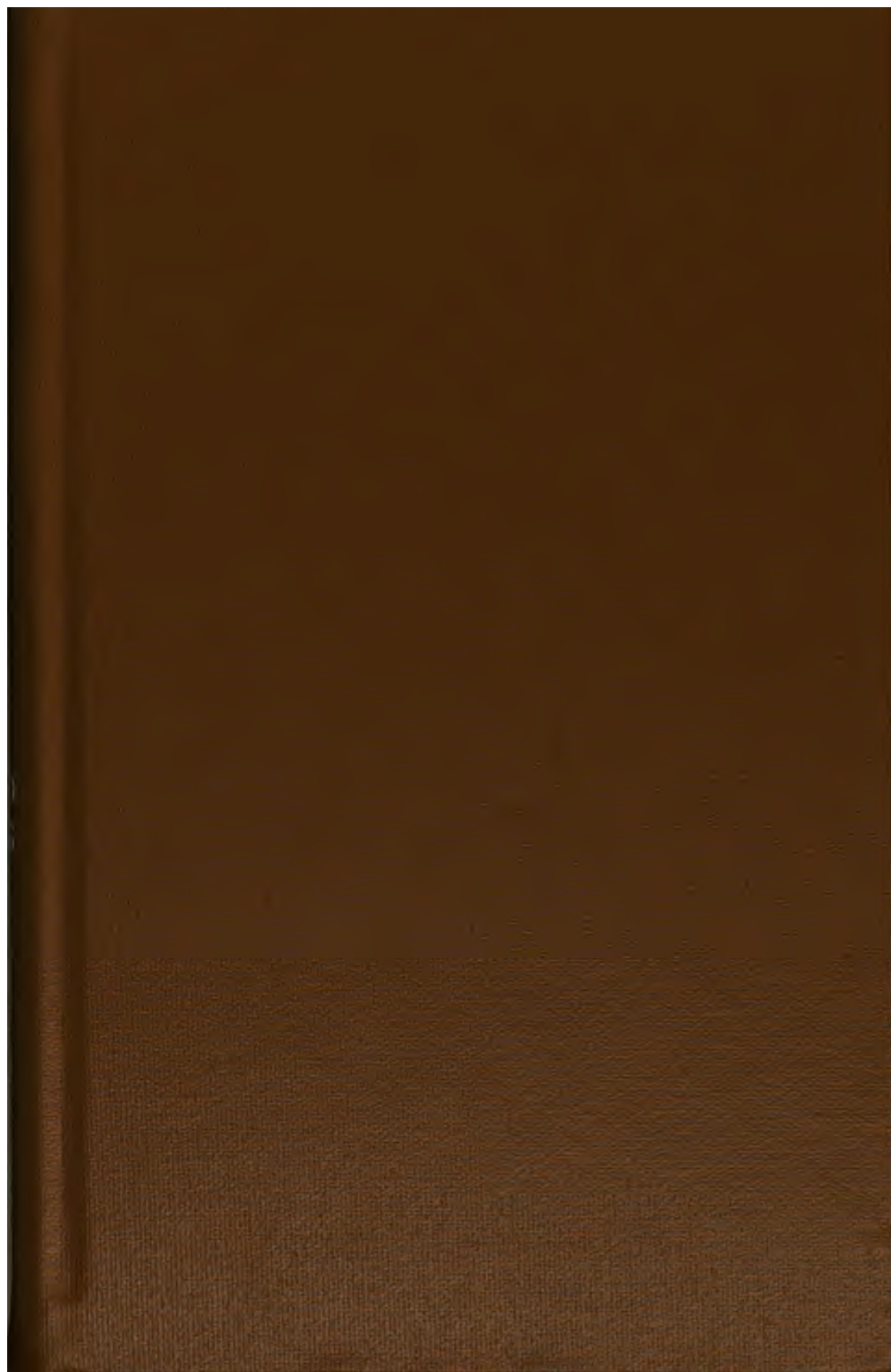
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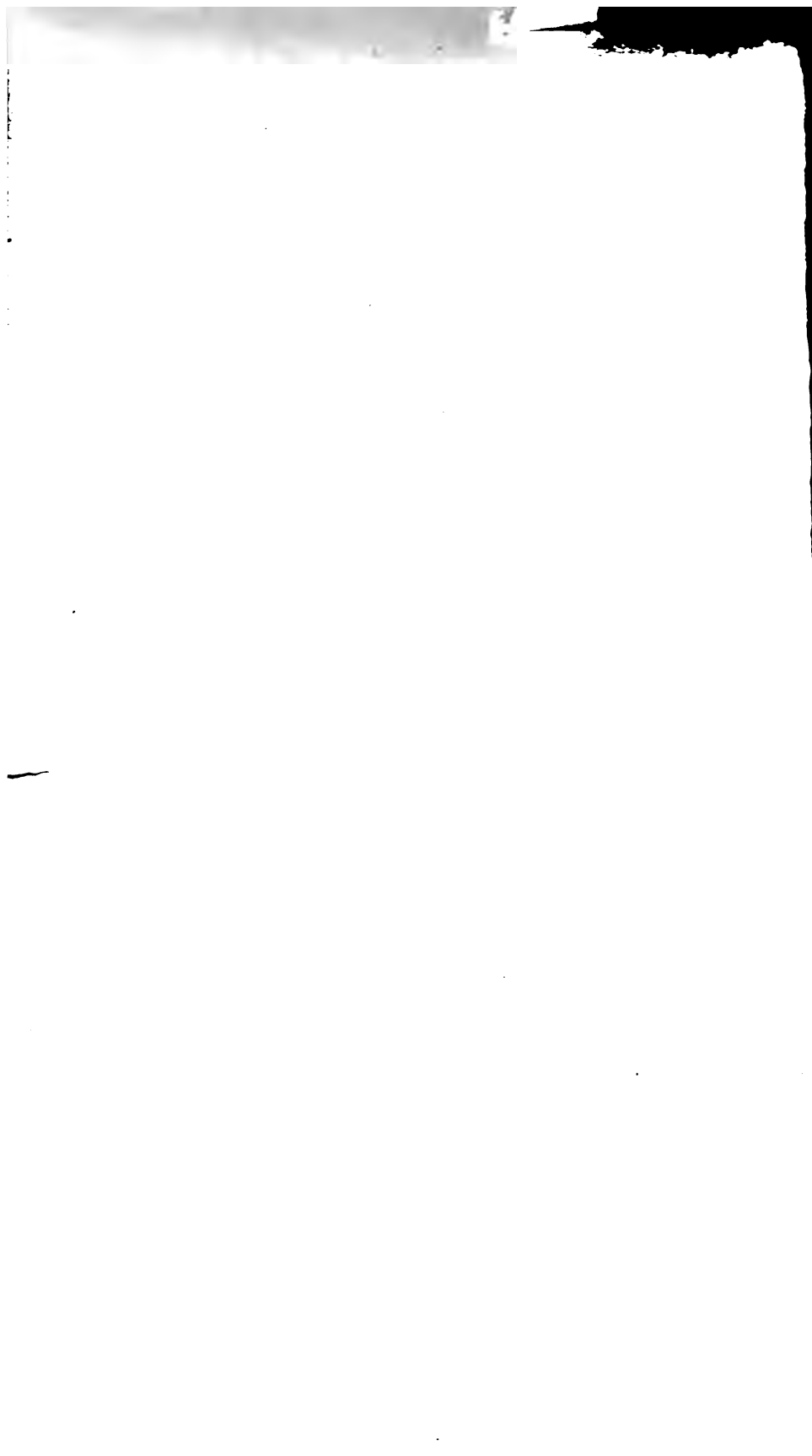
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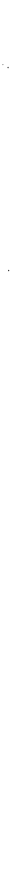


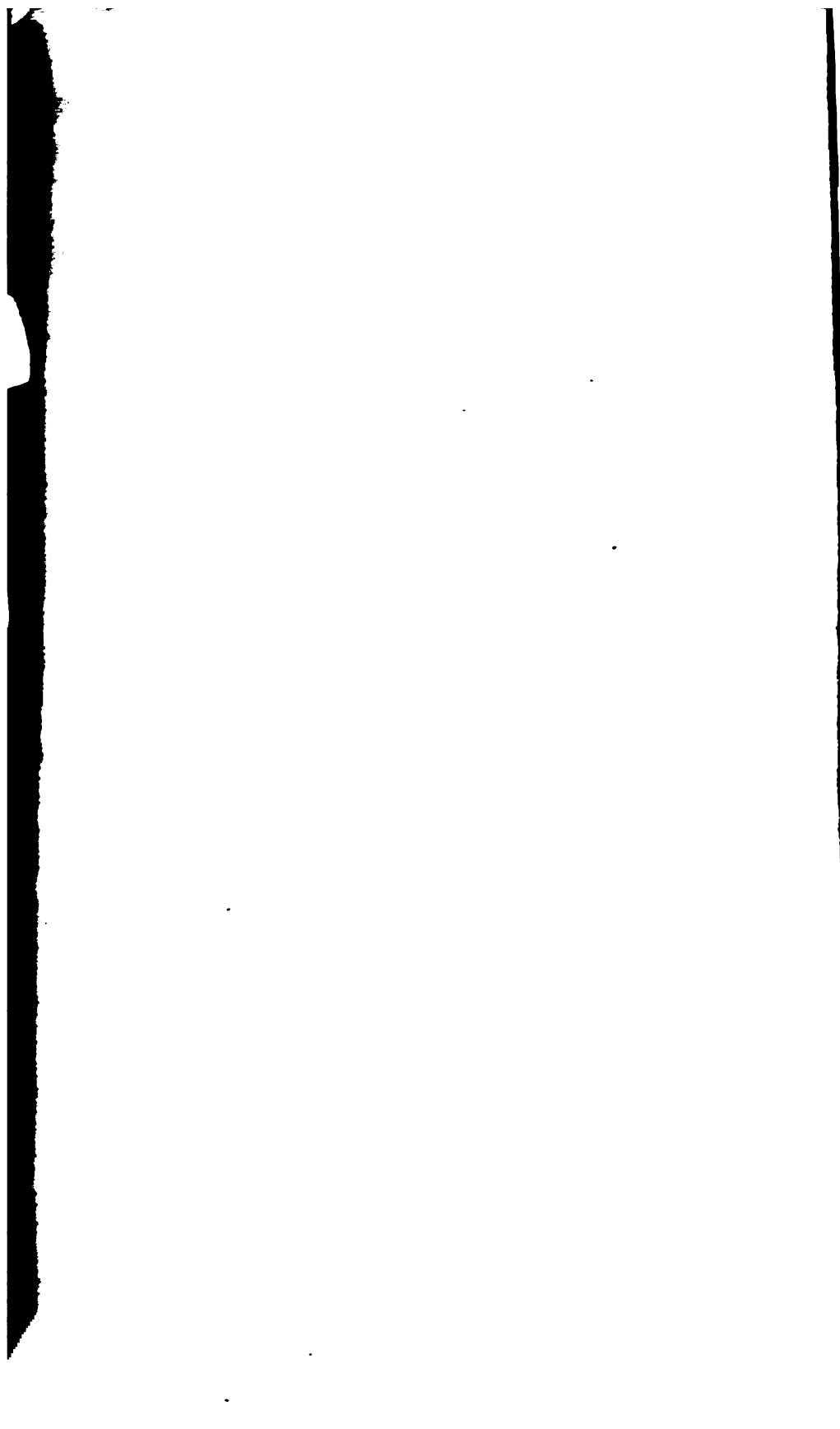
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WOOD ON RAILWAY LAW.

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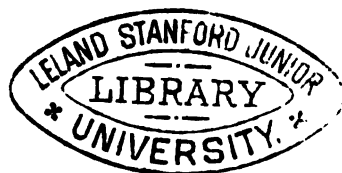
A TREATISE
C
ON
THE LAW OF RAILROADS.

BY
H. G. WOOD,
AUTHOR OF "THE LAW OF LIMITATIONS," "NUISANCES," ETC.

IN THREE VOLUMES.

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LAW OF RAILROADS.

CHAPTER XXI (*Continued*).

TICKETS: EXPULSION OF PASSENGERS.

SEC. 361. Expulsion of Passengers.
362. Place of Removal.
363. Manner of Removal.

SEC. 364. Damages for wrongful Expul-
sion.
365. Free Passes or Tickets.

SEC. 361. *Expulsion of Passengers.* — We have already seen that a railway company may refuse to receive certain classes of persons as passengers; and it is equally true that a person who has entered one of its trains as a passenger, may, under certain circumstances, be expelled therefrom, — as, drunken and disorderly persons, or others whose conduct or appearance is such as is calculated to operate as a serious annoyance to other passengers, or is disgusting.¹ But the exercise of this right, for the cause stated *supra*, is always attended with risk to the company, and should never be exercised except where the proof of misconduct, etc., is full and complete.

An intoxicated passenger who advises other passengers not to pay their fare is guilty of disorderly conduct, and the conductor of the train may, after tendering him such "proportion of the fare he has paid as the distance he then is from the place to which he has paid his fare bears to the whole distance for which he has paid his fare," remove him from the train, and, unless unnecessary force is used, the company incurs no liability on account of such removal.²

¹ *Railway Co. v. Valleley*, 32 Ohio St. 345. In *Lemont v. Washington, &c. R. R. Co.*, 1 Mackay (D. C.), 180, 46 Am. Rep. 238, it was held that a person who is unable to sit up, and is sick to vomiting in a horse-car, may lawfully be

expelled from the car. But the court admitted that this rule would not be applicable on a steam-railway.

² *Baltimore, Pittsburgh, &c. R. R. Co. v. McDonald*, 68 Ind. 316.

A passenger who is guilty of gross misconduct, either by insulting or assaulting other passengers or the conductor, or who uses vile or profane language in the car, or who threatens to assault other passengers or the conductor, may lawfully be expelled from the train.¹ But a railway train is legally open to passengers of all grades and classes who deport themselves properly, and comply with the reasonable regulations of the company; and no one has a right to expect or require that all persons who are carried therein shall be above reproach in a moral or social sense, or that their attire or personal appearance shall be such as is adapted to drawing-room use, but only that their conduct, attire, and appearance shall be decent, and not such as to disgust the eyes of persons of ordinary sensibilities, or the moral sensibilities of persons whose sensibilities in that respect are of an ordinary class. The reputation of a passenger, however bad, so long as he conducts himself properly, affords no ground for expelling the passenger from the train. This is so, even though the statute expressly confers the power upon a railway company to exclude or expel a certain class of passengers from its trains, as such statutes are very properly held to be unconstitutional. Thus, a statute which authorized railway companies to exclude or expel unchaste persons from its trains, was held to be unconstitutional, so far as it related to railroads running between two or more States, it being a regulation of inter-State commerce that the State has no power to make. The spirit of our institutions and form of government does not uphold the exercise of such unwarrantable powers, or permit them to be conferred upon irresponsible persons, to act at their own pleasure and determine arbitrarily whether a person is or is not a proper person to be conveyed in a public vehicle. Reputation and character are of too much value to be sacrificed or injured by any such summary proceeding, and the wisdom of the decision last referred to cannot be successfully questioned.

A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from hotels, theatres, and other public places cannot be imported into the law of common carriers, nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men

¹ Pittsburgh, &c. R. R. Co. v. Hanten, 48 Ind. 90.

or women.¹ And where a woman was excluded from the "ladies' car" because she was of notoriously bad character, the defendant pleaded a reasonable regulation authorizing the exclusion, and that the plaintiff came within it. It was held that it is a mixed question of law and fact whether the regulation is reasonable or not, to be submitted to the jury, on proper instructions by the court, and that it will not be determined on demurrer.² And a motion for new trial was overruled, and a verdict of \$3,000 for the expulsion of the plaintiff sustained.³ It would be ill-advised and extraordinary to confer upon railway conductors the power to determine whether or not a female passenger was a chaste or unchaste person, or whether or not a reputation which attached to her in that respect was so notorious as to justify her expulsion or exclusion from railway trains merely on account of such reputation; and it is to be hoped that such extraordinary legislation will not find general favor in the States of this country. The power of removal from the trains for extreme misconduct, etc., upon the trains, seems to be quite sufficient for all humane or practical purposes, without establishing a tribunal of "one" to act both as judge and jury, to determine arbitrarily and without responsibility whether or not a person's reputation in certain respects is such as to deprive him of the right to travel in public vehicles,—and thus to ostracise, if not virtually to outlaw him.

A person who refuses to pay his fare or to show his ticket when demanded by the conductor, from that time becomes a trespasser, and may be removed from the train;⁴ and the same is also true where

¹ *Brown v. Memphis & Charleston R. R. Co.*, 5 Fed. Rep. 499.

² *Brown v. Memphis, &c. R. R. Co.*, 4 Fed. Rep. 37.

³ *Brown v. Memphis, &c. R. R. Co.*, 7 Fed. Rep. 51.

⁴ *Pittsburgh, &c. R. R. Co. v. Van Hanten*, 48 Ind. 9; *Stone v. Chicago, &c. R. R. Co.*, 47 Iowa, 82; *Bennett v. New York Central R. R. Co.*, 5 Hun (N. Y.), 589; affirmed, 69 N. Y. 594; *Swan v. Manchester, &c. R. R. Co.*, 132 Mass. 116. That a passenger is required to exhibit his ticket when requested by the conductor, and may be expelled from the train if he refuses, see *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 455. A person has no right to a passage upon a ticket which has been

punched so as to indicate that it has once been used, nor where it has been so mutilated as to render it impossible to determine whether it has been used or not. Thus, where a passenger attempted to travel upon a train, offering a ticket that was void by reason of having a hole punched in it, and was ejected from the cars three or four miles from a station, it was held that while the passenger might have been ejected at a regular station, the company had no right to eject him at any other point, and having done so, were liable, but that \$1,000 damages was excessive; and a verdict for that amount was set aside. *Terre Haute, &c. R. R. Co. v. Vanatta*, 21 Ill. 188; *Chicago, &c. R. R. Co. v. Peacock*, 48 id. 253. A railway company

the rules of the company require all passengers to purchase a ticket before entering the cars, and forbid the conductors from taking money for fares; a passenger who neglects to supply himself with a ticket may be removed from the car although he tenders his fare in money.¹ So where a person is wrongfully in possession of his ticket, although ignorant of that fact, as where he innocently purchased it with counterfeit money, he may be ejected from the train unless he rectifies the wrong upon demand.² The same rule prevails where in paying his fare to the conductor, the latter through mistake gives the passenger back too much change; unless he rectifies the mistake when called upon to do so, he may be expelled. Thus, a passenger, who had not procured a ticket previously to entering the train, handed the conductor a \$10 bill to pay his fare of \$6.20; in making the change the conductor handed him \$5 too much. Upon the demand of the conductor that the mistake be corrected, M. refused, and declined to examine his change to ascertain if the conductor's claim of mistake was correct. When he had ridden as far as the payment made entitled him to ride he was directed to leave the train, and did so. It was held that, having the means at hand to determine whether or not the mistake had been made, and failing to use them, he was not entitled to damages for expulsion from the train.³

A passenger cannot excuse himself from paying his fare when demanded, by the circumstance that he had not then decided how far he would go or at what station he would stop. Thus, the plaintiff got upon the train without a ticket, and when his fare was demanded, declined to pay at the time, on the ground that he had not yet made up his mind how far he would go. The conductor demanded of him that he should pay to some place on the line. On his refusal, the train was stopped, and as he was being put off, he

owned and operated two tracks from S. to R., one of which was longer than the other, and the fare upon the longer route was forty-five cents more than upon the other. A passenger, having purchased a ticket for the short route, insisted upon riding upon the long route without paying the extra fare; the conductor punched his ticket, but put him off at the next station. It was held that the ticket was not destroyed by being punched, and that the conductor had a right to expel the passenger upon his refusal to pay the fare. *Adwin v. N. Y. Central, &c. R. R. Co.*, 60 Barb. (N. Y.) 590. Where a passenger offered a

worthless piece of paper, claiming it to be a pass, and refused to pay fare or leave the train, the servants of the company had a right to remove him from the train at a regular station, and to use the necessary force for the purpose. *Chicago, &c. R. R. Co. v. Herring*, 57 Ill. 59.

¹ *McCarthy v. Dublin, &c. Ry. Co.*, 5 Ir. Rep. C. L. 244; *Lane v. East Tenn. R. R. Co.*, 5 Lea (Tenn.), 124.

² *Memphis, &c. R. R. Co. v. Chastine*, 54 Miss. 503.

³ *McCarthy v. Chicago, Rock Island, & Pacific R. R. Co.*, 41 Iowa, 432.

tendered a \$20 gold piece and offered to have \$1.35 taken out, that being the fare to Cornwall. The conductor ejected him from the train. It was held that the action of the conductor was justifiable.¹ A passenger wrongfully upon a train may be removed, and the corporation will only be liable for unnecessary violence.² Where a passenger has purchased a ticket and applies for passage, the employes of a railway company have no discretion, but are bound to carry him according to the terms of the ticket. If the holder of the ticket deports himself properly, the company has no right to refuse the ticket, or, so long as he deports himself properly, to eject him from the train before reaching the station named in the ticket.³ And it is the duty of the agents to ascertain whether a passenger has purchased a ticket, before ejecting him from the cars; and their negligence in this respect cannot be pleaded or urged as a defence, nor considered in mitigation of damages. If it afterwards turns out that the passenger had a ticket, then no matter how much the agent was mistaken, nor how honestly he may have believed that the passenger had not paid for his ticket, or how little force was used in ejecting the passenger, the act was nevertheless unlawful and wrong; and for any injury which the passenger received on account of such expulsion he is entitled to full compensation in damages.⁴

In an action for damages against a railroad company for ejecting the plaintiff from the defendant's cars, evidence that a friend of the plaintiff offered to pay the amount claimed by the conductor, while the latter was attempting to put the plaintiff off the train for refusal to pay his fare, was held not to be proper evidence to show that the plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance. But evidence that the plaintiff had made an ineffectual attempt to procure a ticket before entering the train, although incompetent to show his right to remain on the cars without payment of fare, would be proper, in order to show his good faith in getting aboard without his ticket, and as a part of the *res gestæ*.⁵ In a Texas case, a passenger purchased a ticket from one not the agent of the road, which was issued by one who was the general ticket-agent of another railway company. The agent issu-

¹ *Fulton v. Grand Trunk R. R. Co.*, 17 U. C. Q. B. 428.

² *Lake Shore, &c. R. R. Co. v. Pierce*, 47 Mich. 277; *Shelton v. Lake Shore, &c. R. R. Co.*, 29 Ohio St. 214.

³ *Churchill v. Chicago & Alton R. R. Co.*, 67 Ill. 390.

⁴ *Quigley v. Central Pacific R. R. Co.*, 11 Nev. 350.

⁵ *Perkins v. Missouri, &c. R. R. Co.*, 55 Mo. 201.

ing the ticket was authorized, by custom among railroads, only to issue tickets of a certain prescribed form. The ticket purchased was not of the prescribed form, and on being presented was not accepted by the conductor, who ejected the passenger from the car after the train had proceeded a few miles from the station, on his refusing to pay his fare as a passenger. On appeal by the railway company from a judgment for \$750 damages against it, it was held that, the ticket having been issued by one who at most occupied to the defendant company the relation of special agent, the passenger purchased the ticket at his own peril. The ticket when presented being detached from the stub, and having printed on it the words "not good if detached," the conductor acted properly in rejecting it.¹

A passenger who presents to the conductor a "stock pass" from the railroad company, which entitles him to return on its road without payment of fare, can recover damages sustained by him when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, — although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes; and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return.² Where the plaintiff purchased an excursion-ticket with the printed condition, "Good this day only on all trains, except the Boston express trains," and was expelled from the Boston express train for non-payment of fare, it was held that he had no cause of action.³ In a New York case, the plaintiff purchased from defendant at Patchogue an excursion-ticket to Brooklyn which read, "Good until three days after date. Excursion-ticket," and on the same rode to Brooklyn. On the following day he took a train from Brooklyn, which arrived at Babylon late at night, and did not connect with any train for Patchogue. He drove to the next station east, remained there over night and in the morning took a train for Patchogue, from which he was without violence ejected by the conductor, in compliance with a regulation of the company providing that stop-over checks should not be given on excursion-tickets. It was held that the company was authorized to remove him, and that he was not entitled to recover; that the plaintiff, under his contract with the company, could only demand a continuous passage.⁴

¹ *Houston, &c. R. R. Co. v. Ford*, 53 Tex. 364.

² *Nolan v. N. Y., New Haven, & Hartford R. R. Co.*, 41 N. Y. Super. Ct. 541.

³ *Graham v. Pacific R. R. Co.*, 66 Mo. 536.

⁴ *Terry v. Flushing, &c. R. R. Co.*, 13 Hun (N. Y.), 359.

In a Nebraska case, *G.*, a resident of Lincoln, Nebraska, purchased in Chicago a land-exploring ticket, with coupons attached, to Lincoln and return, of an agent of the B. and M. R. R. Co. in Nebraska, for \$23.75, the regular fare to Lincoln being \$18.75. The ticket contained provisions that it was to be used only by the purchaser, who was to sign his name to the same whenever requested to do so by the conductors of the train. It was held that a resident of the State, if he made no misrepresentations in purchasing the same, could purchase and use such a ticket, but no one but the purchaser could use it, and that possession of the ticket was *prima facie* evidence of ownership; and that the failure of the plaintiff to sign his name to the contract on the ticket, there being no evidence that he had been requested to do so, did not invalidate it, as the signature was merely a mode of identifying the purchaser; and that the rules and regulations of the company could not be pleaded as an excuse for not performing an express contract; that, even if the ticket was obtained by false representations, the contract was voidable, not void, and the company could not retain the excess over regular fare, and refuse to perform the contract; nor would the failure of the agent to require the purchaser to sign the contract invalidate the ticket, notwithstanding these rules, if the company retained the consideration.¹

A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train-fare of persons without tickets, although he may have an understanding or contract with the station-agent of whom the ticket was purchased, that it would be received after the time limited on the face of it; and on the refusal to pay the fare, ejection from the train was not wrongful. And the measure of damages, in a suit for a breach of the alleged contract, is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination.² A person on a train refusing to produce a ticket or pay his fare, subsequently changing his mind, and tendering full fare, would be entitled to continue his journey on the train. But if the refusal be accompanied by violent and abusive conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right; and the conductor, using proper discretion, may remove him not-

¹ *Gregory v. Burlington & Missouri River R. R. Co.*, 10 Neb. 250.

² *Hall v. Memphis & Charleston R. R. Co.*, 15 Fed. Rep. 57.

withstanding a tender of full fare is then made.¹ But this rule is subject to the exception that if the circumstances of the refusal of the passenger to pay are not such as make him strictly a trespasser, a tender of the fare at any time before an actual eviction from the train reinstates him as a passenger. Thus, a passenger who gets upon the cars of a railroad company in good faith, in ignorance of the fact that a tax-certificate would not pay his fare, having no intention to impose upon the carrier, cannot be treated as a mere trespasser; but on failure or refusal to pay his fare, after request and after reasonable opportunity allowed to comply, he may be ejected or put off the cars by the conductor; but if before eviction another person offers to pay the fare, the carrier is bound to receive it and convey the passenger.² But where the refusal to pay is such that the passenger becomes a trespasser, he cannot after the bell is rung to stop the train, reinstate himself as a passenger by an offer to pay his fare.³ So when a passenger has been ejected from the train, and

¹ *Gould v. Chicago, &c. R. R. Co.*, 18 Fed. Rep. 155; *Hoffbauer v. Davenport & Northwestern R. R. Co.*, 52 Iowa, 342; *Louisville, Nashville, &c. R. R. Co. v. Harris*, 9 Lea (Tenn.), 180; *Thomas v. Geldart*, 4 P. & B. (N. B.) 95; *O'Brien v. New York Central, &c. R. R. Co.*, 80 N. Y. 236; *Nelson v. Long Island R. R. Co.*, 7 Hun (N. Y.), 140; *Farwell v. Grand Trunk R. R. Co.*, 15 U. C. C. P. 427; *Shedd v. Troy & Rutland R. R. Co.*, 40 Vt. 88; *Wentz v. Erie R. R. Co.*, 3 Hun (N. Y.), 241; *Briggs v. Grand Trunk R. R. Co.*, 24 U. C. Q. B. 570; *Boston, &c. R. R. Co. v. Proctor*, 1 Allen (Mass.), 267; *Lillis v. St. Louis, &c. R. R. Co.*, 64 Mo. 464; *Sherman v. Chicago, &c. R. R. Co.*, 40 Iowa, 45; *Powell v. Pittsburgh, &c. R. R. Co.*, 25 Ohio St. 70.

² *Louisville & Nashville R. R. Co. v. Garrett*, 8 Lea (Tenn.), 438; *South Carolina R. R. Co. v. Nix*, 68 Ga. 572. A railway company as a carrier is entitled to receive its fare as a condition precedent to carrying passengers; but when this is paid or offered to be paid, the duty is imperative on the carrier, where no legal objection to the passenger exists. An offer to pay the fare of a passenger by a third party while the conductor is on his way out with the passenger, and before actual ejection, must be accepted by the conductor, and

ejection after such offer is unlawful where there is no captious or factious or vexatious refusal to pay, but only an inability growing out of a mistake. *Garrett v. Louisville, & Nashville R. R. Co.*, *ante*; *O'Brien v. New York Central & Hudson River R. R. Co.*, 80 N. Y. 236. Where a passenger tenders a railway conductor a certain amount of fare to be carried to a certain station, which is less than the rate fixed by the company, saying he will pay no more, and the conductor retains enough to take the passenger to an intermediate station and returns the balance, the passenger will have the right, on reaching such intermediate station, to pay the fare demanded from that point to the place of his destination, and upon his offering to pay the same he cannot rightfully be put off the train. *Chicago, Burlington, & Quincy R. R. Co. v. Bryan*, 90 Ill. 126. If a passenger is ejected from a train for failure to pay his fare, and after the train is in motion he tenders it, the conductor is not bound to stop the train to receive his fare and take him on board; if the tender were made while the train was standing still, the conductor was bound to receive the fare and admit the passenger. *South Carolina R. R. Co. v. Nix*, 68 Ga. 572.

³ *Hoffbauer v. Delhi, &c. R. R. Co.*, 52 Iowa, 342. But where the train is stopped

purchases a ticket from the point at which he has been ejected, and attempts to re-enter the train, he must pay fare from the point at which he first entered the train, before he can insist on being carried forward on the same train.¹

SEC. 362. Place of Removal. — Except in cases where the statute provides that a passenger shall only be expelled at a regular station, or near a dwelling-house, the question as to whether he was properly expelled at any other point is one of fact, to be determined by the circumstances.² But in the case of a person who is by reason of any infirmity unable to travel, or find his way from the point where he is put off to a dwelling-house or town; or if a person is put off the train at a point remote from habitations at a time when the weather is so inclement as to render it unsafe or inhuman to do so, —

at a regular station, at which it would have stopped any way, if the passenger before he is ejected offers to pay the fare, it should be accepted. The contrary rule applies only where the train is stopped expressly to put him off. *Toledo, &c. R. R. Co. v. Wright*, 68 Ind. 586; 34 Am. Rep. 277. In *O'Brien v. New York Central, &c. R. R. Co.*, 80 N. Y. 233, an action by a passenger for his wrongful ejection from one of defendant's trains, for refusal to pay as much fare as was demanded by the conductor, it appeared that the train had stopped at a regular station, and not for the sole purpose of putting plaintiff off. Before he was ejected, the plaintiff and other persons in his behalf, after the train was stopped, offered to pay the full amount of fare demanded. It was held that evidence of this fact was admissible on behalf of the plaintiff. If the stopping had been made for the sole purpose of putting the plaintiff off and he had rendered it necessary by a fractious refusal to pay the extra fare, he would not have been entitled to insist on continuing his trip after having occasioned such an interruption. But the station being a regular stopping-place of the train, if, before being ejected, he or others in his behalf offered to pay the full fare, the conductor should have accepted it. The hypothetical case put *obiter* by the court arose and was decided in *Hoffbauer v. D. & N. R. R. Co.*, 52 Iowa, 342. The cars were stopped to eject the passenger, when he tendered the proper fare, but it was refused, and he was

put off. This was sustained. The court said: "The rule that a passenger may test the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after expulsion had commenced, is not only uncalled for for the just protection of the recusant passenger, but would tend to encourage a practice which, if indulged in, would interfere with the convenience of the company and the despatch and quiet to which other passengers are entitled." In *Stone v. Chicago & N. W. R. R. Co.*, 47 Iowa, 82, 29 Am. Rep. 458, where the passenger was ejected at a regular station for non-payment of fare, and then purchased a ticket to the desired point, he could not demand re-admission to the same train without paying the disputed fare for the unpaid distance.

¹ *Stone v. Chicago & Northwestern R. R. Co.*, 47 Iowa, 82; *State v. Campbell*, 33 N. J. L. 309; *Swan v. Manchester, &c. R. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; *O'Brien v. Boston, &c. R. R. Co.*, 15 Gray (Mass.), 20; *O'Brien v. N. Y. Central, &c. R. R. Co.*, 80 N. Y. 236; *Nelson v. Long Island R. R. Co.*, 7 Hun (N. Y.), 140.

² *Brown v. Chicago, &c. R. R. Co.*, 51 Iowa, 235; *Toledo, &c. R. R. Co. v. Brown*, 68 Ind. 586; *Chicago, &c. R. R. Co. v. Boyer*, 1 Brad. (Ill.) 472; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 38 id. 116; 10 Am. Rep. 103.

the company would be liable therefor. Thus, in a recent case in Kentucky,¹ the plaintiff while intoxicated got on the defendant's railway train, and refusing or failing to pay his fare, was put off by the conductor in the snow, and by exposure to the cold was severely frozen and lost several of his toes and fingers. A recovery was maintained.² In most of the States the statute makes provision that the removal shall be made at a regular station, or near a dwelling, etc.; and in such case, the statute must be complied with or the removal will be unlawful.³ In Indiana, where the statute provides that a person refusing to pay his fare, the conductor, etc., "may put him out of the cars at any usual stopping-place," it is held that this is merely a permissive and not a peremptory statute, and that, as the right to expel exists independently of the statute, it does not prevent the company from putting out the passenger at any other point.⁴ But in Texas, under a similar statute, it was held that a person could only be ejected at a place where passengers are received; and that a person expelled at a "wood and water station" was entitled to recover damages therefor.⁵

SEC. 363. Manner of Removal. — The conductor and servants of a railway company have a right to use all the force necessary to remove a passenger from the train who has forfeited his right to remain there, *and no more*. The same rule prevails in this respect as exists relative to the removal of persons from one's dwelling, and if the force used is excessive, or brutal, the company is responsible therefor.⁶ In a Wisconsin case,⁷ the company had set apart a car for the exclusive use of ladies unattended by gentlemen, and the plaintiff being unable to find a seat elsewhere on the train, except in the smoking-car, went into the ladies' car, without objection from any one, in which there were many vacant seats, and, when about to occupy one of these, without having been first requested to leave the car, was rudely and violently seized by the defendant's brakeman, and forcibly thrust from the car to the platform; the train was then crossing a river, though, from the construction of

¹ Louisville, &c. R. R. Co. v. Sullivan (Ky., Feb. 1884).

² See also Vankirk v. Penn. R. R. Co., 76 Penn. St. 66; Galena v. Hot Springs R. R. Co., 13 Fed. Rep. 116.

³ Texas, &c. R. R. Co. v. Casey, 52 Tex. 112.

⁴ Toledo, &c. R. R. Co. v. Wright, 68 Ind. 586; 34 Am. Rep. 277.

⁵ Texas, &c. R. R. Co. v. Casey, 52 Tex. 112.

⁶ Galena v. Hot Springs R. R. Co., 13 Fed. Rep. 116; State v. Ross, 26 N. J. L. 224; Coleman v. New York & N. H. R. R. Co., 106 Mass. 160; Gt. Western R. R. Co. v. Miller, 19 Mich. 305.

⁷ Bass v. Chicago, &c. R. R. Co., 39 Wis. 636; 36 id. 450.

the platform, the peril to the plaintiff from that circumstance was slight; the assault was committed in the presence of a number of ladies and gentlemen; the plaintiff's cane, and a ring on one of his fingers, were broken, and the broken ring cut the finger to the bone, making a ragged wound; the back of one of his hands was lacerated or bruised so that blood flowed from the wound; and one arm was somewhat bruised, and showed extravasation for three weeks thereafter. Under instructions which did not allow exemplary damages, the plaintiff had a verdict and judgment for \$4,500, which was held excessive. But upon a new trial it was held that as the injury was one which, in an action against the brakeman, would sustain a verdict for exemplary damages, if the company ratified his act it was likewise liable for such damages.¹ In a New York case, a brakeman was stationed by the defendant at the entrance to one of its passenger-cars, with orders to notify gentlemen not in charge of ladies that such car was reserved for ladies, and direct them to cars forward. The plaintiff entered the car after receiving such notice, and was ejected therefrom with undue force, and was seriously and permanently injured. It was held that, although the brakeman, in removing the plaintiff, exceeded the orders given him by using undue force, yet the presumption was that, in doing it, he was acting within the scope of his authority, and a refusal to nonsuit the plaintiff on the ground that he was not, was proper.²

¹ *Bass v. Chicago, &c. R. R. Co.*, 42 Wis. 654.

² *New York Central R. R. Co. v. Peck*, 70 N. Y. 587. If a conductor approaches a passenger with a drawn revolver and commands him to leave the train, he is guilty of a gross outrage, especially when the passenger has shown no such resistance as to justify such a course. Indeed, it may be said that, with or without a deadly weapon, a conductor has no right to compel a passenger to leave the train by threats of bodily harm, especially when it is in motion. *Galena v. Hot Springs R. R. Co.*, 13 Fed. Rep. 116. But where a servant does draw a deadly weapon upon a passenger it is competent for the company to show that the train has been boarded in that locality on previous occasions by roughs and confidence men, who had attacked the servant, for the purpose of explaining why he was armed, especially where exemplary damages are claimed

on account of the use of such weapon. *Chicago, &c. R. R. Co. v. Boger*, 1 Brad. (Ill.) 472. While a passenger may be expelled for non-payment of fare, etc., yet it must be done in a decent manner, and with discretion. If the expulsion is made with undue force, or under circumstances which show brutality, it cannot be justified. Thus, a female passenger purchased a ticket for a passage from Kansas City to Utica. She exhibited her ticket to the baggage-master, who checked her baggage to that point, and was assisted to board the train by the company's servant, and was not informed by any of them that the train did not stop at that station. Upon the arrival of the train at a station some miles from Utica, she was told by the conductor to get off, and upon her refusal to do so, he used profane and threatening language to her, and the brakeman, sent by him, took her little girl, thereby compelling her to follow with her baby,

SEC. 364. Damages for wrongful Expulsion. — Where a passenger is wrongfully expelled from a railway train, he is entitled to recover the actual damages which he sustained therefrom,¹ and if the expulsion was attended with undue force or other aggravating circumstances, calculated to wound the pride of or humiliate the passenger, such exemplary damages as the jury think, in view of the circumstances, he ought to have. Thus, where a party is forcibly and unlawfully ejected from a car, in the presence of other passengers, and the conductor publicly announces that the passenger has refused to pay his fare, a jury may properly find from such facts that the party thus ejected suffered feelings of shame and humiliation, without any other proof on that subject.² And in estimating the damages the jury may take into consideration the plaintiff's condition in life, his reputation in the community, and any circumstances attending the act complained of; but they cannot consider the wealth of the defendant or the poverty of the plaintiff.³ If the agent uses more force than is necessary to eject a passenger, or uses vile epithets toward him, such conduct should always be considered by the jury in aggravation of damages.⁴ In a New York case, the plaintiff, under a contract made with the defendant, claimed to be entitled, by virtue of a commutation-ticket, to ride to East New York. Having exercised this right for some time, the defendant refused to carry him to that point unless he would pay extra fare from Jamaica to East New York; and upon his refusal so to do, in obedience to an order of defendant the conductor ejected him from the train, using no unnecessary violence. The court charged that the evidence was not sufficient to give punitive damages against the conductor, but that the plaintiff was entitled to have the railroad company punished to such an extent as the jury should, in their discretion, say the facts authorized and demanded. It was held that the charge was erroneous.⁵ A contract of carriage is made with reference to the reasonable regulations of the carrier

and leave the train at nine o'clock at night, where she was compelled to remain in the dark and cold for half an hour until the freight train came along. She was made sick by the exposure. The court held that she was entitled to recover exemplary damages. *Hicks v. Hannibal, &c. R. R. Co.*, 68 Mo. 329.

¹ *Pittsburgh, &c. R. R. Co. v. Slusser*, 19 Ohio St. 157; *Hicks v. Hannibal, &c. R. R. Co.*, 68 Mo. 329.

² *Chicago & Northwestern R. R. Co. v. Chisholm*, 79 Ill. 584; *Chicago, &c. R. R. Co. v. Williams*, 55 Ill. 185.

³ *Hays v. Houston, &c. R. R. Co.*, 46 Tex. 272; *Chicago, Burlington, & Quincy R. R. Co. v. Bryan*, 90 Ill. 126.

⁴ *Quigley v. Central Pacific R. R. Co.*, 11 Nev. 350. But see *Hicks v. Hannibal, &c. R. R. Co.*, 68 Mo. 329.

⁵ *Parker v. Long Island R. R. Co.*, 18 Hun (N. Y.), 319.

for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. Therefore where there is a dispute arising on the train about the ticket, it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And, if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of the contract.¹ Where the plaintiff was ejected, without violence, by the conductor, under the mistaken impression that he had not paid his fare, and the inconvenience was but trifling, and the jury awarded 50 l. damages, a new trial was awarded on the ground of excessive damages.² In an Indiana case, the conductor took up the ticket of a passenger, which entitled him to ride to a certain place, and, having given him no check, afterward, when within a few miles of the passenger's destination, accused him of attempting to ride beyond the distance for which he had paid, charging him with falsehood, and treating him insolently in the presence of the other passengers, and with the help of a brakeman, seized and put him off the train in a rude and angry manner, at a place where there was no station or house, it being cold and dark, and being about nine o'clock at night, and the passenger had to walk to his destination. In an action by the passenger against the company for damages for such treatment, there was a verdict for the plaintiff for \$700; and it was held that the damages were not excessive.³ So where a passenger was expelled from the train in a rough manner, accompanied with profane and unbecoming language, the court would not disturb, as excessive, a verdict for damages in the sum of \$562.50.⁴ So an award of \$2,500 for compensatory damages was held, especially in view of the former verdicts in the case, not to be so disproportioned to the injury sustained as to bear marks of passion, prejudice, partiality, or corruption in the jury, and therefore not to be excessive.⁵ In a suit by a passenger for being wrongfully

¹ *Hall v. Memphis & Charleston R. R. Co.*, 15 Fed. Rep. 57; *Hall v. Memphis, &c. R. R. Co.*, 9 Fed. Rep. 585.

² *Huntsman v. Great Western Ry. Co.*, 20 U. C. Q. B. 24; *Davis v. Gt. Western Ry. Co.*, 20 id. 27.

³ *Indianapolis, &c. R. R. Co. v. Milligan*, 50 Ind. 392.

⁴ *St. Louis & Southeastern R. R. Co. v. Myrtle*, 51 Ind. 566.

⁵ *Bass v. Chicago & Northwestern R. R. Co.*, 42 Wis. 654.

ejected from the cars, it appeared that the rates of fare fixed by the company, and which, by its established rules, it was made the duty of the conductor to demand, were higher than were lawful. The plaintiff tendered the legal rates, and upon refusal to pay more, was ejected from the cars, but without any rudeness or unnecessary violence. It also appeared that the plaintiff, at the time he took passage, knew the established rates, and expected to be expelled from the cars, intending to bring an action therefor, in order to test the right of the company to charge the established rates. It was held that the plaintiff was only entitled to compensatory damages, and that it was competent for the company, for the purpose of mitigating damages, or preventing the recovery of exemplary damages, to give in evidence subsequent declarations of the plaintiff, tending to prove that his object was to make money by bringing suits against the company for demanding illegal fares.¹ If the conductor of a train ejects a passenger so that he is run over and disabled by the train, and another train of the same line passing shortly afterwards extinguishes what life is left, a right of action arises, whether the actual death was caused by the first or second train.²

SEC. 365. Free Passes or Tickets.—A pass given to a person by a railway company entitles the person holding it to ride upon the road according to its terms, unless it is revoked by the company, as it may be even during the passage, unless given upon some consideration. Being given gratuitously it follows that the company may impose any reasonable condition upon its use, but it cannot by any condition absolve itself from liability for gross negligence.³ But in some of the cases it is held that, inasmuch as the passage is gratuitous, the person accepts it subject to all its conditions, and therefore

¹ Cincinnati, &c. R. R. Co. v. Cole, 29 Ohio St. 126.

² South Carolina R. R. Co. v. Nix, 68 Ga. 572.

³ Rose v. Des Moines Valley R. R. Co., 39 Iowa, 246; Ohio, &c. R. R. Co. v. Nickless, 71 Ind. 271; Jacobus v. St. Paul, &c. R. R. Co., 20 Minn. 125; Buffalo, &c. R. R. Co. v. O'Hara (Penn.), 9 Am. & Eng. R. R. Cas., 317. But see Illinois Central R. R. Co. v. Read, 37 Ill. 484; Nolton v. Western R. R. Co., 15 N. Y. 444; Chicago, &c. R. R. Co. v. Hazzard, 26 Ill. 373; Ohio, &c. R. R. Co. v. Muhling, 30 Ill. 9; Gillenwater v. Madison, &c. R. R. Co., 5 Ind. 339; Elliott v. Western, &c. R. R.

Co., 58 Ga. 457; Indiana Central R. R. Co. v. Mundy, 21 Ind. 48; Sutherland v. Great Western R. R. Co., 7 U. C. C. P. 409; McCauley v. Furness Ry. Co., L. R. 8 Q. B. 57; Duff v. Great Northern Ry. Co., L. R. 4 Ir. 178; Gallin v. London, &c. Ry. Co., L. R. 10 Q. B. 212, to the contrary. Also, holding that such condition inures to the benefit of connecting roads, Hall v. North-Eastern Ry. Co., L. R. 10 Q. B. 437; Welles v. N. Y. Central, &c. R. R. Co., 26 Barb. (N. Y.) 641; affirmed, 24 N. Y. 181; Perkins v. N. Y. Central, &c. R. R. Co., 24 N. Y. 208; Kinney v. Central R. R. Co., 32 N. J. L. 407; 34 id. 513.

that it may absolve itself from all liability to the holder for gross negligence;¹ while in others it is held that public policy forbids that a railway company should be permitted to stipulate for exemption from liability for injuries caused by its negligence, wilful default, or tort.² But the weight of authority, as we think justly, supports the proposition that the company may, under passes or free tickets, by contract stipulate for exemption from liability for injuries resulting from its ordinary negligence, but not against injuries resulting from its gross negligence or wilful misconduct.³ A receiver of a railway, cannot make a valid contract for a pass for life;⁴ nor is a pass given to a person without a valid consideration for life irrevocable, although given in pursuance of a vote of the corporation. Thus, a director of a railroad corporation had rendered special services in procuring subscriptions to the stock of the company and in its organization, which services were rendered on his part in the expectation of compensation. After the company was organized, the stockholders, in view of these services, voted to grant him a free pass over the road for himself and family during his life, which grant was inadequate as a compensation for the services, but was accepted by him as such. Some years after, the stockholders rescinded the vote. It was held in an action brought by the company for railroad fares accruing after that time, that if the vote was intended as a contract founded upon the indebtedness of the company for the services rendered as a consideration, and not as a mere gratuity, about which there was room for question, yet that the services rendered created no indebtedness, and could not constitute a consideration for the contract; and that it would have made no difference if the services had been rendered, not only with an expectation of compensation on his part, but upon an express understanding with his associates that he was to be paid by the company after its organization. Aside from the technical difficulty of binding a corporation before its existence, the policy of the law wholly discountenances such arrangements.⁵

¹ *Kinney v. Central R. R. Co.*, 32 N. J. L. 407. See note 1, *ante*.

² *Mobile, &c. R. R. Co. v. Hopkins*, 41 Ala. 486; *Cleveland, &c. R. R. Co. v. Curran*, 19 Ohio St. 1; *Penn. R. R. Co. v. Henderson*, 51 Penn. St. 815; *Flinn v. Wilmington, &c. R. R. Co.*, 1 Houst. (Del.) 469.

³ *Boswell v. Hudson River R. R. Co.*, 5 Bos. (N. Y.) 699; *Poucher v. N. Y. Central R. R. Co.*, 49 N. Y. 263.

⁴ *Martin v. New York, &c. R. R. Co.*, 36 N. J. Eq. 109.

⁵ *New York & New Haven R. R. Co. v. Ketchum*, 27 Conn. 170.

CHAPTER XXII.

SLEEPING AND PARLOR CARS.

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| <p>SEC. 366. Liability of Railway for injuries to Passengers in Parlor-Cars.</p> <p>367. Free Pass, conditional: effect of purchase of Ticket in Parlor-Car upon conditions in.</p> | <p>SEC. 368. Liability of Parlor-Car Companies for Articles Lost or Stolen.</p> <p>369. Obligation to receive Passengers.</p> |
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SEC. 366. Liability of Railway Company for Injuries to Passengers in Parlor-Cars. — The practice of running trains controlled by two separate and distinct corporations has become quite common in this country, and as a result, questions as to the relative liability of these corporations will be likely often to arise. It has been held in several cases¹ that where a passenger has purchased a ticket of a parlor-car company entitling him to ride in its car, and also a passage-ticket of the railway company, the railway company is to be regarded as liable for the negligence of the palace-car company; and that its servants are to be treated as the servants of the railway company in everything that regards the safety and security of the passenger. Upon grounds of expediency and public policy this doctrine is well founded, and it also finds farther and additional support from the obligation which the company is under to run none but safe cars, and those which are fit and adequate for the business;² and it cannot in this respect

¹ Penn. R. R. Co. v. Roy, 102 U. S. 451; Columbus, &c. R. R. Co. v. Walrath, 38 Ohio St. 461.

² Penn. R. R. Co. v. Roy, *ante*. It appeared in this case that the defendant purchased at the office of the lessee company, in the city of Chicago, a "first-class railroad ticket" from that city to Philadelphia, over the line of that company, paying therefor the sum of \$14.40. At the same time and place, and of the same person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Company, for the route between the same cities, and for that ticket he paid the additional sum of \$5. He took the train the same

day, going immediately into the section of the sleeping-car corresponding to his ticket. The next morning, at Alliance, Ohio, upon the invitation of a friend travelling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so engaged, the upper berth of the section in which they were sitting fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the plaintiff upon the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating

substitute the care and diligence of another corporation for its own, nor can it shield itself from liability upon the ground that it had no authority or power to repair these cars or test their suitableness. It is bound to do so, and, inasmuch as it is not bound to haul the cars except by virtue of its contract, if it fail to provide in its contract for such examination and repair of the cars as it is bound to make in executing its obligations to its passengers, the fault is its own. In each of the cases cited, the plaintiff, who was passenger upon a parlor-car upon the defendant railway, was injured by the fall of a berth, and in both cases the railway company was held liable for the injury. In both of the cases cited stress was placed upon the circumstance that there was no evidence to show that the plaintiffs knew that the parlor-cars were owned and controlled by a separate corporation, and in the absence of proof of knowledge of that fact by a passenger there is no question that he has a right to presume that the whole train is under the care, control, and management of the railway company.¹ What the effect of notice or actual knowledge of the real condition of things would be is thus left open, especially in the Ohio case; but from the grounds upon which HARLAN, J., placed the liability of the railway company, it is doubtful whether that circumstance would have any influence upon the question of liability. The real ground of liability being the duty which the railway company owes to passengers of running none but sound and sufficient cars, and that by consenting to haul the cars, the passenger has a right to regard it as an assurance by it that the car is safe, it is not believed that notice or knowledge of the real *status* of the two companies would affect the liability of either.²

medical treatment. The court held that the railroad company was liable, and that the fact that the plaintiff was not injured in the car in which his ticket entitled him to ride made no difference.

¹ Thorpe v. R. R. Co., 76 N. Y. 402; 32 Am. Rep. 325; Kinsley v. R. R. Co., 125 Mass. 54; 28 Am. Rep. 200.

² In Columbus, &c. R. R. Co. v. Walrath, 38 Ohio St. 461, it was held that a passenger, by train of a railroad company, travelling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management; and in such case, where he sustains injury by the negligence of one in the employ of the

sleeping-car company, he may maintain an action against the railroad company. The court said: "Counsel for plaintiff in error argue in this case that sleeping-cars have become recognized as so far necessary to the comfort and convenience of passengers by railway, that railway companies may be compelled, in like manner, to attach the coaches of sleeping-car companies to their trains, where they have failed to provide their own cars for such purpose, in which case there should be a corresponding modification of the liability of the railroad company; and that whether the arrangement between the companies be enforced or conventional, the railroad company should not be liable for injury to passengers resulting

SEC. 367. Free Pass, conditional: Effect of Purchase of Ticket in Parlor-Car upon conditions in. — We have already stated the rules applicable to a free pass, and that the company can impose any reasonable condition to its use; but in a recent case before the Common Pleas Court of New York City,¹ a novel and very important question relating to injuries received by a person riding on a free pass, with the usual exemption from liability for injuries, was decided, and, as we think, correctly. In that case, the passenger rode in a palace-car, for which he bought a ticket, and in which he was riding when injured. The court held that, while if he had been riding in the ordinary cars of the company, he might not have been entitled to recover, yet, having also purchased a ticket entitling him to ride in the palace-car, he was, by virtue of the relation thus created, while riding in that car entitled to the same care and the same rights as any passenger. VAN HOESEN, J., said: "The plaintiff was using this free ticket undoubtedly, but he was also using another ticket, which he purchased and paid for. If he had been travelling on the free pass alone, the stipulations that it contains would have been a bar to his recovery. The language of the stipulation means that if the person using the pass accepts free passage he shall relinquish his right to compensation for injuries; and the law of this State holds that a free passage is itself a full consideration for a contract that will discharge a carrier of passengers from its common-law liability. The pass entitled him to ride in one of the common cars of the company, but the plaintiff wished accommodations of a better kind, and therefore he applied for transportation in one of the drawing-room cars that form a part of the defendants' trains. He was accepted as a passenger in the drawing-room car called the 'Empire,' and paid one dollar for

solely from negligence of the agents of the sleeping-car company. In support of this view, attention is called to the fact that in *Penn. R. R. Co. v. Coy*, 102 U. S. 451, where the liability of the railroad company for an injury received in a car of the Pullman Palace Car Company, was asserted, HARLAN, J., lays stress on the fact that the railroad company had published and circulated cards, which were in such form as to induce the belief that the sleeping-car was under the management and control of the railway company. But on examination of the whole opinion, we find there was no intention to place the liability on such narrow ground; and we have no

hesitancy in saying, that in the absence of notice that the company will not be liable for defective appliances in the sleeping-car or negligence of servants of the sleeping-car company, a passenger may well assume that the whole train is under one general management. *Thorpe v. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Kinsley v. R. R. Co.*, 125 Mass. 54; 28 Am. Rep. 200. How far a railway company may, by agreement with a sleeping-car company, known to the passenger, exonerate itself for liability for such injuries, is a question concerning which we express no opinion."

¹ *Ulrich v. N. Y. Central R. R. Co.*, 31 Alb. L. J. 302.

transportation in that car to New York. If the free pass gave him the right to travel on the train *it gave him no right to travel in that car*, and it is evident that the rights and relations of the parties were changed by the sale to him of the ticket for the drawing-room car. He became a passenger for hire. Of that there can be no doubt, nor can there be any doubt that he was at the same time using a free pass. As a passenger for hire, who, in bargaining for transportation in the drawing-room car, had made no contract that relieved the company from its liability for damages if he were injured through its negligence, the plaintiff has all the rights that the law gives to ordinary passengers; and having paid for a ticket he is not to be considered as one who, in consideration of a free passage, has agreed not to hold the company liable for injuries. The defendant voluntarily made a new contract, and cannot now ignore it and insist that the rights of the parties shall be measured by a contract that was intended to operate upon a condition of affairs that it has seen fit to change. The defendant has taken money from the plaintiff for carrying him, and it has no right to say that he was a free passenger, and to ask the court to incorporate into the drawing-room ticket the provisions of the free pass. Of course, we have heard the objection that the defendant did not, but that the Wagner Car Company did, make the contract to carry the plaintiff in the drawing-room car. We know nothing of the arrangement between the defendant and the Wagner Car Company, but as no one without leave of the defendant can run cars upon its track, we must assume that the drawing-room cars are run for the benefit of the defendant."¹

Upon the same principle upon which the doctrine of this case rests, there would seem to be no reason why a passenger who has purchased a second-class ticket, entitling him to a passage in an emigrant-car, might not, by purchasing a ticket in a parlor-car be entitled to be carried upon such ticket, although purchased at greatly reduced rates. He would only be entitled to ride in the emigrant-car, unless he purchased the privilege of riding in the parlor-car, and having done so, there is no reason why such ticket should not be good for his passage.

SEC. 368. Liability of Parlor-Car Companies for Articles Lost or Stolen. — Palace and sleeping cars are of modern origin, and have found a place in the affairs of the travelling public so recently that

¹ Thorpe v. N. Y. Central R. R. Co., 76 N. Y. 409; 82 Am. Rep. 325.

the law relative to their duties and liabilities can hardly be said to be settled, although there have been several cases before the courts involving these questions; and to determine their duties and obligations it is necessary to ascertain the position they hold towards the train, as a part of which they are hauled. It is a matter of common knowledge, that these cars are run by a corporation entirely distinct from the railway corporation over whose roads they run, and therefore they are not open to any passenger upon the train but only to such as pay the requisite extra compensation therefor and are accepted by such company. These corporations, standing alone, cannot be said to be common carriers in any sense, or subject to the rules applicable to common carriers. They do not "carry" the passengers, or undertake to do so, nor do they become responsible for their safe carriage beyond the implied guaranty that their cars are sound, safe, and roadworthy, which is an implied obligation arising from their contract, which applies to any person or corporation who lets a vehicle for hire. It is held, and with great propriety, that the liability of the railway company for the safe carriage of a passenger in one of these cars, remains unchanged; that by accepting and adopting these cars as a part of its train, it is responsible for any defects therein, and a passenger who is injured by reason of their defective condition may have his remedy against either or both corporations.

The palace-car company merely furnishes the car, and says to the travelling public that upon payment of the sum charged for seats therein, we will furnish you with accommodations which you cannot obtain upon the regular trains, to wit, roomy and comfortable chairs by day, and a bed at night, with toilet arrangements, etc. It simply contracts to furnish these attractive and additional accommodations during the trip. It does not undertake to carry the passenger, nor does it hold itself out as having any authority or control over the train or its passage over the rails. No one understands, or has any right to understand when he takes passage in one of these cars, that the company owning it becomes obligated to him to take him to his point of destination safely, except in so far as the roadworthiness, etc., of its own cars is concerned, or to land him there upon schedule time. But while strictly they are not common carriers of passengers, yet, owing to their peculiar relation to the public and the railway company, they owe certain duties to the public which they cannot evade or shirk. They invite the public to ride in their cars, and by receiving the extra compensation therefor, they impliedly contract

that their cars are safe and roadworthy and that they will at least exercise ordinary care to protect both the passenger *and his property* which he may have in his custody. It is quite true that a passenger upon an ordinary railway-car, takes the risk of the loss of any personal baggage or effects which he may take with him into the car; and while he may sleep in his seat if he can, yet he does so at his peril; and if while sleeping, thieves rob him of his money or baggage, the loss is his own, because the railway company has not contracted either expressly or impliedly to keep watch over his goods, either while he is asleep or awake;¹ but in sleeping-cars a different condition of things exists, and the very object and purpose of the cars, and the inducement which the company holds out to the public for taking passage in them is, that passengers may sleep. In a recent case in Kentucky² the court, in a very able opinion in which the liability of these companies is discussed, say: "These cars are in themselves an invitation to the travelling public to enter and protect themselves against the weariness of a long journey by disrobing and sleeping. The passenger in buying and the company in selling

¹ In *Weeks v. N. Y., New Haven, &c. R. R. Co.*, 9 Hun (N. Y.), 669, in which this question was involved, the verdict was for the sum of \$16,685.47, which was the value, with interest, of certain bonds stolen from the person of the plaintiff while he was a passenger on one of the defendant's cars. The train of which it was a part had arrived near Twenty-seventh Street, on Fourth Avenue, in the city of New York. It had been there detached for the purpose of being taken a short distance by horses to the depot of the defendant. While it was awaiting the arrival of the horses, three men from the street went upon the forward part of the car, two of them being inside and the other remaining on the platform. The plaintiff was seated near the centre of the car and went to the forward end to discover the cause of the detention. When he approached the two men his arms were seized by one, who backed him toward the door, near which another was standing, who also seized hold of him, and with the assistance of the third, who then rushed in, he was robbed of his bonds. No person employed by the company was in the car at the time, and no precautionary measures had been taken by it to protect its passen-

gers against pillage. Another robbery was shown to have taken place near the same vicinity, but whether it was before or after this one did not appear. Upon these facts the court ruled that the plaintiff was entitled to recover the value of the bonds taken from him, except one which was overdue and was afterward returned; and the only point presented by the case was, whether that ruling was correct. It appeared that the plaintiff carried the bonds in an inside pocket, and that he gave no notice to the defendant or any of its agents of the fact that he had them. They were in no way placed under the charge of the defendant, but they were solely and wholly retained by the plaintiff. He made no contract with the company other than that to be deduced from his purchase of an ordinary passenger ticket, and paid nothing for the safe carriage of the bonds in his possession unless it was included in the purchase-price of his ticket. The court held that the company was not liable. See opinion of DANIELS, J., which contains an able statement of the liability of railway companies in such cases.

² *Pullman Palace Car Co. v. Gaylord* Ky. Sup. Ct., 6 Ky. Law Rep. 279.

the ticket contemplate that this privilege will be improved. *The company accepting compensation under these circumstances impliedly undertakes to keep a reasonable watch over the passenger and his property.* The faithful performance of this undertaking is the limit of its duty in this respect. Its breach must be the foundation of every action seeking to charge the company with the loss of articles the passenger has taken with him upon the car. In the case at bar the defendant was held liable without regard to the faithfulness of its servants. *If they exercised proper care by keeping a reasonable watch over the plaintiff's property,* there was no breach of any undertaking on the part of the company, and hence no liability." This seems to us to be not only an accurate but a clear and concise statement of the duty of these companies in respect to the care which is due from them to their patrons, and it is the rule generally held.

In a recent Pennsylvania case,¹ the plaintiff purchased a ticket from the company at Philadelphia which secured him an upper berth in a sleeping-coach leaving Philadelphia on the 11:30 P.M. train. There were on this train two sleepers in charge of five employes, the usual number, and consisting of a conductor, one cook, and three porters. The plaintiff on entering the car had on his person a gold watch valued at two hundred and fifty dollars, and about fifty-five dollars in money. His berth was already made up, and he retired shortly after the train started. Before getting into his berth he took off his coat and vest, put his watch and pocketbook in the inside pocket of his vest, and put it under the outside corner of the mattress of his berth, lay down and was soon asleep, and did not awake until near Huntingdon, about seven o'clock next morning, when the passenger conductor called for his railroad ticket. On looking for it he discovered that his watch and money were gone. He called the porter, and sent him to tell the conductor, who came, and the plaintiff made known to him that he had been robbed. Officers were telegraphed for and met the train at Tyrone to search the passengers, but the missing property was not found. Two passengers who had taken berths from Philadelphia to Altoona got off at Harrisburgh, and from this fact were suspected as being the guilty parties. Every effort was made by the agents and employes of the company to detect the thieves, but without avail. The conductor of the sleeper remained on duty in the coach until 3 A.M., when he left his post and put the colored porter upon guard, *who went*

¹ Pullman Palace Car Co. v. Gardner, — Penn. —.

out for a time to black boots. The regulations required a continuous watch during the night. The plaintiff had a verdict for the amount of his loss, which was sustained upon appeal. In an Indiana case,¹ the plaintiff, who was a passenger upon one of the defendant's cars, while sleeping in his berth, was robbed of three hundred and ninety-six dollars, as the court trying the case, at the request of the parties, specially found, through the negligence of the defendant in not maintaining a sufficient watch over the cars during the night, to prevent thefts. The court upon these facts, stated its conclusions of law therefrom, as follows: 1. That the defendant is not responsible as a common carrier; 2. That the defendant cannot be held to the liability of an innkeeper, but that upon the facts, *it having failed to keep a sufficient watch during the night*, it was liable for the loss, and rendered judgment for the plaintiff for three hundred and ninety-six dollars. Upon appeal, the Supreme Court sustained the lower court as to its conclusions of law, and the judgment was affirmed.²

¹ Woodruff Sleeping, &c. Car Co. v. Diehl, 84 Ind. 474; 43 Am. Rep. 102.

² In Pullman Palace Car Co. v. Gaylord, Ky. Sup. Ct., 6 Ky. Law Rep. 279, it was held that in the absence of proof of negligence, a sleeping-car company is not liable for a diamond pin stolen from the berth of a passenger. The court, citing Clark v. Burns, 118 Mass. 275; 19 Am. Rep. 456, and Steamboat Crystal Palace v. Vanderpoel, 16 B. Mon. (Ky.) 302, said: "It would be difficult to give any valid reason why a sleeping-car company should be held to any more rigid liability in such cases than a steamboat company. It could no more be said that a sleeping-car was an 'inn on wheels' than that a steamboat was an inn on water. They both provide sleeping-apartments for passengers, who pay for the privilege, and are expected to occupy them. Sleep is as essential to the health and comfort of the traveller in the one case as in the other. The servants of the steamboat company certainly have the implied custody of the passenger's wearing apparel to as great an extent as the servants of the sleeping-car company. The resemblance of a steamboat to an inn is even greater than that of the sleeping-car, since it is customary for the former to provide meals for its passengers. If, then,

the rigid liability of innkeepers is not to be extended to the owners of steamboats, common justice demands that it be not applied to the owners of sleeping-cars. And we find this rule has been followed so far as the responsibilities of the latter have been the subject of judicial inquiry. While these adjudications are not placed upon the same ground, their conclusions are substantially the same. We cannot concur in some of the reasons assigned in the various opinions, but we think their decisions are, in the main, correct." The court also remarked upon Blum v. Pullman Sleeping Car Co., 3 Cent. Law Jour. 592; Palmett v. Wager, 11 Alb. Law Jour. 149; Welsh v. Pullman Palace Car Co., 16 Abb. Pr. (N. Y.) 252; Pullman Palace Car Co. v. Smith, 73 Ill. 360; 24 Am. Rep. 258; Woodruff S. & P. C. Co. v. Diehl, 84 Ind. 474; 43 Am. Rep. 102, and concluded as follows: "While therefore the stringent liability of an innkeeper, which the distinguished Chief Justice COLERIDGE has said does not 'stand on mere reason, but on custom growing out of a state of society no longer existing,' is not to be applied to the owners of sleeping-cars, it does not follow that they assume no duties or liabilities."

From the cases cited it will be seen that these companies are not to be regarded either as common carriers or innkeepers, or subject to liability as such, and are only held up to reasonable diligence in keeping up a proper watch to prevent the depredations of thieves at night, which is a duty that is implied from their contract with the passenger; and against this doctrine no valid objection can be urged.

SEC. 369. *Obligation to receive Passengers.* — A question of considerable importance arises, in view of the fact that these companies are held not to be subject either to the liability of common carriers or innkeepers, whether they are bound to furnish accommodations for all who apply for them so long as they have room. In a recent case in Illinois¹ the court intimate that they are. In that case an action on the case was brought against the defendant for refusing to permit the plaintiff to occupy a sleeping-berth assigned to him and which he had offered to pay for. It was contended that the action should have been assumpsit, but the court held that it was well brought. It is true that MULKEY, J., in the course of his opinion says that any passenger who applies for a berth, against whom no objection exists, etc., is entitled to have it upon paying or offering to pay therefor; but this is mere *dicta*, and had no relation to the question before the court, as in that case a contract had actually been entered into for the berths in question, and they had been assigned to the plaintiff under the contract. Yet I think he is correct in saying that the company is under such an obligation; and the ground upon which the obligation rests *grows out of the obligation of the railway company to the travelling public, and of the relation of the palace-car company to the railway company.* Railway companies as common carriers of passengers are bound to furnish equal facilities and accommodations to all passengers, as they are to all freighters; and inasmuch as these cars comprise a part of its train, although not owned by the railway company, nevertheless *they must be subject to the obligations which the law imposes upon the railway company, in reference to its cars and the equal accommodations and facilities therein which the railway company is bound to afford its passengers;* and the palace-car company must at least be regarded as impliedly contracting that it will be subject to these obligations. In my judgment, upon no other ground could the railway company justify the hauling of these cars, as a constant part of its trains.

¹ *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222.

This view finds strong support in a New York case.¹ In that case a passenger on the defendant's railway finding no vacant seats in the ordinary coaches, the seats being occupied by passengers or their baggage, proceeded to a drawing-room car owned by a private individual, but forming a part of the train and regularly run with it by contract with the defendant, and there took a seat. When called on for extra fare for the seat, he refused, stating that he was ready to go into the other cars if a seat was provided for him there. The porter of the drawing-room car thereupon attempted to eject him. In an action against the railway company for the assault, it was held liable. It is unfortunate that the relations of these companies to the public are not defined by statute. They have assumed an importance and prominence in railway travel, which requires that their obligations should be definitely fixed and not left to the shifting policy which sometimes marks the decisions of courts, or to the doubts which fairly exist as to what their true status is in railway trains.

¹ *Thorpe v. N. Y. Central, &c. R. R. Co.*, 76 N. Y. 402 ; 32 Am. Rep. 325.

CHAPTER XXIII.

LIABILITY TO EMPLOYÉES.

SEC. 370. Risks assumed by Employés.

- 371. Remaining in Service after knowledge of Defects, not Negligence *per se*.
- 372. Servant must exercise his Judgment.
- 373. What Care Company must exercise.
- 374. Duty of Company to inspect Appliances.
- 375. Degree of Care required of the Master.
- 376. Master is presumed to have discharged his Duty.
- 377. Company liable for Acts of Agents, when.
- 378. Not bound to Adopt latest Improvements.

SEC. 379. When patent Defects do not excuse Master's Liability.

- 380. Inexperienced Employés: New Risks, etc.
- 381. Employment of insufficient number of Servants.
- 382. Duty of Company to establish Rules.
- 383. Using Machinery improperly or for improper Purpose.
- 384. Master's Exemption extends only to time of actual Service.
- 385. Receiver of Railway liable as Master.
- 386. What the Servant must establish.
- 387. How Master may relieve himself from Liability.

SEC. 370. *Risks assumed by Employés.*—It is now universally held that when a person enters into the employment of another, he assumes all the risks ordinarily incident to such employment, and for injuries resulting to him therefrom, there is, at the common law, no ground of recovery.¹ "Servants," said Lord CRANWORTH, "must

¹ Wood's Law of Master and Servant, chap. 15; Indianapolis, &c. R. R. Co. v. Flanagan, 77 Ill. 365; Nashville, &c. R. R. Co. v. Elliott, 1 Cold. (Tenn.) 612; Patterson v. Pittsburgh, &c. R. R. Co., 76 Penn. St. 389; Marquette, &c. R. R. Co. v. Taft, 28 Mich. 289; O'Neil v. St. Louis Iron Mountain, &c. R. R. Co., 3 McCrary (U. S. C. C.), 423; Kenney v. Shaw, 133 Mass. 501; Green St., &c. R. R. Co. v. Coates, 97 Penn. St. 103; Cazier v. Taylor, 10 Gray (Mass.), 274; Seavor v. Boston & Maine R. R. Co., 14 id. 466; Gilman v. Eastern R. R. Co., 10 Allen (Mass.), 233; Coombs v. New Bedford Cordage Co., 102 Mass. 572. A servant assumes the risk naturally and reasonably incident to his employment. He is not

bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. Hayden v. Smithville Mfg. Co., 29 Conn. 548. It is the knowledge of the servant which withholds from him a right of action. Harkins v. New York Central R. R. Co., 65 Barb. (N. Y.) 129; Dillon v. Sixth Ave. R. R. Co., 48 N. Y. Superior Ct. 283; Sykes v. Parker, 99 Penn. St. 465; Baker v. Western, &c. R. R. Co., 68 Ga. 699; Missouri, &c. R. R. Co. v. Lyde, 57 Tex. 505; Watson v. Houston, &c. R. R. Co., 58 Tex. 434; Umbach v. Lake Shore, &c. R. R. Co., 83 Ind. 191; Chicago, &c. R. R. Co. v. Clark, 11 Ill. App. 104; Chicago, &c. R. R. Co. v. Jones, 11

be supposed to have the risk of the service in their contemplation when they *voluntarily* undertake it and agree to accept the stipulated remuneration. This, however, supposes that the master has secured proper servants and proper machinery for the conduct of the work."¹ "A person is not bound to enter a particular service," says

- Ill. App. 324; Chicago, &c. R. R. Co. v. Simmons, 11 Ill. App. 147; Chicago, &c. R. R. Co. v. Bragonin, 11 Ill. App. 516; Wabash, &c. R. R. Co. v. Fenton, 12 Ill. App. 417; Chicago, &c. R. R. Co. v. Hagar, 11 Ill. App. 498; Henry v. Lake Shore, &c. R. R. Co., 49 Mich. 495; Morse v. Minneapolis, &c. R. R. Co., 30 Minn. 465; Memphis, &c. R. R. Co. v. Jones, 2 Head (Tenn.), 517; Summerhays v. Kansas, &c. R. R. Co., 2 Cal. 484; Laning v. N. Y. Central R. R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Strahendorf v. Rosenthal, 30 Wis. 674; Noyes v. Smith, 23 Vt. 59; Frazier v. Penn. R. R. Co., 38 Penn. St. 104; Owen v. New York Central R. R. Co., 1 Lans. (N. Y.) 108; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Wright v. N. Y. Central R. R. Co., 25 N. Y. 562; Mad River, &c. R. R. Co. v. Barber, 5 Ohio St. 541; Baltimore, &c. R. R. Co. v. Woodward, 41 Md. 298; Moss v. Johnson, 22 Ill. 642; DeWitt v. R. R. Co., 50 Mo. 302; Piper v. Railroad Co., 1 T. & C. (N. Y.) 290; Salters v. Del. & Hud. Canal Co., 5 T. & C. (N. Y.) 559; McGatrick v. Wason, 4 Ohio St. 566; Bartonshill Coal Co. v. Reid, 3 Macq. (Sc.) 265; Priestley v. Fowler, 3 M. & W. 1; Griffiths v. Gidlow, 3 H. & N. 648; Seymour v. Maddox, 16 Q. B. 326; Couch v. Steel, 24 Eng. L. & Eq. 77; Snow v. Housatonic R. R. Co., 8 Allen (Mass.), 44; Clarke v. Holmes, 7 H. & N. 937; Hutchinson v. Ry. Co., 5 Exchq. 352; Hathaway v. Michigan Central R. R. Co., 51 Mich. 253; Davis v. Detroit, &c. R. R. Co., 45 Mich. 212; Swoboda v. Ward, 40 Mich. 420; Chicago, &c. R. R. Co. v. Bayfield, 37 Mich. 205; Quincy Mining Co. v. Kitta, 42 Mich. 34; Michigan Central R. R. Co. v. Smithson, 45 Mich. 212; Illinois, &c. R. R. Co. v. Flanagan, 77 Ill. 365; Way v. Ill. Central R. R. Co., 40 Iowa, 341; Baldwin v. Chicago, &c. R. R. Co., 50 Iowa, 680; Northern Central R. R. Co. v. Husson, 101 Penn. St. 1; 47 Am. Rep. 690; Pittsburgh, &c. R. R. Co. v. Seutmeyer, 92 Penn. St. 276; 37 Am. Rep. 384; Baker v. Allegheny, &c. R. R. Co., 95 Penn. St. 215; 40 Am. Rep. 634; Day v. Toledo, &c. R. R. Co., 42 Mich. 523; Atchison, &c. R. R. Co. v. Plunkett, 25 Kan. 188; Gunter v. Graniteville Mfg. Co., 15 S. C. 443; De Graff v. N. Y. Central R. R. Co., 76 N. Y. 125; North Chicago Rolling Mills v. Monks, 4 Brad. (Ill.) 664; Price v. Henagon, 5 Brad. (Ill.) 234; Potts v. Port Carlisle, &c. Ry. Co., 27 L. T. N. s. 233; Mobile, &c. R. R. Co. v. Thomas, 42 Ala. 672; Leonard v. Collins, 70 N. Y. 90; Colorado, &c. R. R. Co. v. Ogden, 3 Cal. 499; Steffen v. Chicago, &c. R. R. Co., 46 Wis. 259; Holden v. Fitchburg R. R. Co., 129 Mass. 530; 39 Am. Rep. 398; Wonder v. Baltimore, &c. R. R. Co., 32 Md. 511; Hanrathy v. Northern Central R. R. Co., 48 Md. 280; Baltimore, &c. R. R. Co. v. Stricker, 51 Md. 47; Smith v. St. Louis, &c. R. R. Co., 69 Mo. 32; Chicago, &c. R. R. Co. v. Scheuring, 4 Brad. (Ill.) 533; Columbus, &c. (R. R. Co. v. Barber, 5 Ohio St. 541; Chicago, &c. R. R. Co. v. Mahoney, 4 Brad. (Ill.) 262; Morris v. Gleason, 1 Brad. (Ill.) 510; Columbus, &c. R. R. Co. v. Webb, 12 Ohio St. 475; Chicago, &c. R. R. Co. v. Platt, 89 Ill. 141; Grand Rapids, &c. R. R. Co. v. Huntly, 38 Mich. 237; Indianapolis, &c. R. R. Co. v. Lane, 10 Ind. 554; Columbus, &c. R. R. Co. v. Arnold, 31 Ind. 174; Indianapolis, &c. R. R. Co. v. Tay, 91 Ill. 474; Toledo, &c. R. R. Co. v. Ingraham, 77 Ill. 309.
- ¹ Bartonshill Coal Co. v. Reid, 3 Macq. 275-284. Where a brakeman, on going into the employment of a railway company, signs a contract binding him to obey all orders, rules, and regulations, but in which the general language applies equally to all classes of employés, the contract to obey all orders must be construed

COLERIDGE, J.,¹ "and, if he does, he must take things as he finds them." "A person must make his own choice," says ERLE, J., in the same case, "whether he will accept employment on premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along a floor in the dark or carry a light. If he sustains injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." Thus it will be seen that the servant not only assumes all risks ordinarily incident to the business, but also *all other open and visible risks, whether usually incident to the business or not*; and if he knows of such defects, the circumstance that he had forgotten the fact of their existence will not help his case.² The master is bound to the exercise

to apply to all which are issued to him in the line of duty in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom. And while the clause binding him to use care and caution applies to anything he may undertake to do, it is for the jury to decide whether he has violated it. *Jones v. Lake Shore & Michigan Southern R. R. Co.*, 49 Mich. 573; *Pennsylvania R. R. Co. v. Wachter*, 80 Md. 395; *Naylor v. Chicago & Northwestern R. R. Co.*, 53 Wis. 661; *Chicago & Northwestern R. R. Co. v. Donahue*, 75 Ill. 106; *Skip v. Eastern Counties Ry. Co.*, 23 L. J. Rep. n. s. (Exch.), 23. A minor who accepts employment from a railway company is bound by the same rules as an adult. But this rule, however, would not apply to a child of tender years. *Houston & Great Northern R. R. Co. v. Miller*, 51 Tex. 270; *Robinson v. Houston & Texas Central R. R. Co.*, 46 Tex. 540; *Union R. R. & Transit Co. v. Leahy*, 9 Brad. (Ill.) 353; *Cruty v. Erie R. R. Co.*, 3 T. & C. (N. Y.) 244. But the principle that an employé assumes the risks of the negligence of his co-employés does not apply as to the employés of a connecting line. *Philadelphia, &c. R. R. Co. v. State*, 58 Md. 372. Where a railroad company is in the habit of constantly taking damaged cars from one station to another for repair, and a person is employed to couple and switch such cars, and while so engaged he is injured in at-

tempting to couple a car to the train, by reason of the broken condition of the car, it was held that the presumption is that he undertook the employment subject to all of the risks incident to the place, and that this was one of the risks he expected to incur when he accepted the employment. *Chicago, &c. R. R. Co. v. Ward*, 61 Ill. 310. An employé engaged in digging a well is held to assume the risks incident thereto. *Galveston, &c. R. R. Co. v. Lampe*, 11 Am. & Eng. R. R. Cas. (Tex.), 201.

¹ *Seymour v. Maddox*, 16 Q. B. 326.

² *Wood's Law of Master and Servant*, 680; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Priestley v. Fowler*, 3 M. & W. 1. In *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, the plaintiff was injured while riding upon one of the defendant's trains. He was a road-master in the defendant's employ, and the injury for which he sought to recover was received by reason of a defective switch, and a lack of proper check-chains on the cars. It appears that the defect in the switch was a latent one, and that the plaintiff knew that some of the company's cars were deficient in respect of check-chains, and that such deficiency rendered their use dangerous. It did not appear that the plaintiff knew that the car in which he was riding was deficient in that respect, but it did appear that *he did not think to look to see whether it was or not until after the accident*. He was held to be remediless. *Priestley v. Fowler*, 3 M. & W. 1; *Skip v. Eastern Counties Railway*

of reasonable care in reference to all the appliances of the business, and is bound to protect his servants from injury therefrom by reason of *latent or unseen defects*, so far as reasonable care can accomplish that result; but he does not stand in the relation of an insurer to the servant against injury, and can only be held chargeable when negligence can properly be imputed to him.¹ The mere fact that an acci-

Co., 9 Exch. 223; Seymour v. Maddox, 16 Q. B. 326; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Sullivan v. India Mfg. Co., 113 Mass. 396; Dillon v. Union Pacific R. R. Co., 3 Dill. (U. S.) 319; Snow v. Housatonic R. R. Co., 8 Allen (Mass.), 441; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Clarke v. Holmes, 7 H. & N. 937; Holmes v. Worthington, 2 F. & F. 533; Patterson v. Pittsburgh, &c. R. R. Co., 76 Penn. St. 389; Dynen v. Leach, 26 L. J. (N. S.) Exch. 221; Assop v. Yates, 2 H. & N. 768; Griffiths v. Gidlow, 3 id. 348.

¹ Wood's Law of Master and Servant, chap. xv.; Brown v. Accrington Spinning Co., 3 H. & C. 511; Hackett v. Middlesex Mfg. Co., 101 Mass. 101. He does not warrant the servant's safety, nor guarantee that the appliances may not prove defective. *He only stipulates to use reasonable care to prevent such a result.* Tinney v. Boston, &c. R. R. Co., 62 Barb. (N. Y.) 218; Riley v. Baxendale, 6 H. & N. 445; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Cayzer v. Taylor, 10 Gray (Mass.), 274; Gilman v. R. R. Co., 10 Allen (Mass.), 233; Hoffnagle v. R. R. Co., 1 T. & C. (N. Y.) 345; R. R. Co. v. Arnold, 31 Ind. 174; R. R. Co. v. Swett, 4 Ill. 197; Columbus, &c. R. R. Co. v. Troesch, 68 id. 545; Wright v. R. R. Co., 25 N. Y. 562; Gibson v. Pacific R. R. Co., 46 Mo. 163. It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants and workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of those they could not foresee. The legal implication is, that the employer will

adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. Snow v. Housatonic R. R. Co., 8 Allen (Mass.), 441, per BIGELOW, C. J.; Cayzer v. Taylor, 10 Gray (Mass.), 274; Seaver v. Boston & Maine R. R. Co., 14 id. 463. Any other rule would be productive of great injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer. King v. N. Y. Central R. R. Co., 4 Hun (N. Y.), 769; Mad River, &c. R. R. Co. v. Barber, 5 Ohio St. 541; Bridges v. St. Louis, &c. R. R. Co., 6 Mo. App. 389; Chicago, &c. R. R. Co. v. Shannon, 43 Ill. 338; Harney v. N. Y. Central R. R. Co., 19 Hun (N. Y.), 556; Dorsey v. Railroad Co., 42 Wis. 583; Flanagan v. Railroad Co., 45 id. 98; 50 id. 462; Leonard v. Collins, 70 N. Y. 90; Bisel v. N. Y. Central R. R. Co., 70 N. Y. 571; Keegan v. Western R. R. Co., 8 N. Y. 175; De Forest v. Jewett, 19 Hun (N. Y.), 509; Houston, &c. R. R. Co. v.

dent occurs by which a servant is injured, does not fix his liability or raise a presumption, even, that he was at fault. Actual negligence upon his part must be both alleged and proved, and negligence which establishes a breach of his implied duty to the servant. So, too, it must appear that the servant was not himself at fault, in such a respect as renders him amenable to the charge of having by his own negligence contributed to the injury. The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the skill and care of his master.¹ And

Oram, 49 Tex. 341; Toledo, &c. R. R. Co. v. Moore, 77 Ill. 217; Bessex v. Chicago, &c. R. R. Co., 45 Wis. 477; Toledo, &c. R. R. Co. v. Ingraham, 77 Ill. 309; Wedgewood v. Chicago, &c. R. R. Co., 41 Wis. 478; Brickman v. So. Carolina R. R. Co., 8 S. C. 173; Toledo, &c. R. R. Co. v. Asbury, 77 Ill. 309; Plank v. N. Y. Central R. R. Co., 1 T. & C. (N. Y.) 319; Stevenson v. Jewett, 16 Hun (N. Y.), 310. In Brown v. Chicago, &c. R. R. Co., 53 Iowa, 595, 36 Am. Rep. 243, it was held that a brakeman can recover of a railway company for an injury received from its failure to have its cars inspected. See also Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Cowles v. Richmond, &c. R. R. Co., 84 N. C. 309; 37 Am. Rep. 620; Hough v. Texas, &c. R. R. Co., 100 U. S. 213; Haskins v. Standard Sugar Refinery, 122 Mass. 400; Cooper v. Central R. R. Co., 44 Iowa, 134. As to liability for injuries from unsafe cow-catchers see Indianapolis, &c. R. R. Co. v. Estes, 95 Ill. 470; unsafe deadwoods, — Toledo, &c. R. R. Co. v. Black, 88 Ill. 112; defective ladders on freight trains, — Toledo, &c. R. R. Co. v. Ingraham, 77 Ill. 309; Chicago, &c. R. R. Co. v. Platt, 89 Ill. 141; Jones v. N. Y. Central R. R. Co., 62 How. Pr. (N. Y.) 450; defective brakes, — Brown v. Gt. Western Ry. Co., 40 U. C. Q. B. 333; Chicago, &c. R. R. Co. v. Hagan, 11 Brad. (Ill.) 498; Chicago, &c. R. R. Co. v. Bragoneer, 11 id. 516; Johnson v. Richmond, &c. R. R. Co., 81 N. C. 453; De Graff v. N. Y. Central R. R. Co., 76 N. Y. 125; defective derricks, — Baker v. Allegheny, &c. R. R. Co., 95 Penn. St. 211; Deroschler v. Lehigh Valley R. R. Co., 87 N. Y. 636; King v. N. Y. Central R. R. Co., 72 N. Y. 607; Kansas, &c. R. R. Co. v. Little, 19 Kan. 267; defective brake-beam, — Wedgewood v. Chicago, &c. R. R. Co., 41 Wis. 478; 44 id. 44; double buffers, — Indianapolis, &c. R. R. Co. v. Flanagan, 77 Ill. 365; check-chains, — Ladd v. New Bedford R. R. Co., 119 Mass. 412; draw-bars, — Whitman v. Wisconsin, &c. R. R. Co., (Wis.) 12 Am. & Eng. R. R. Cas. 1883; cars of unequal height, — Halett v. St. Louis, &c. R. R. Co., 67 Mo. 239; Hodgkins v. Eastern R. R. Co., 119 Mass. 419; Botsford v. Michigan Central R. R. Co., 33 Mich. 256; Fort Wayne, &c. R. R. Co. v. Gildersleeve, 33 Mich. 133; Indianapolis, &c. R. R. Co. v. Toy, 91 Ill. 474; Michigan Central R. R. Co. v. Smithson, 45 Mich. 212; Conway v. Illinois Central R. R. Co., 50 Iowa, 465; Galveston, &c. R. R. Co. v. Delahunty, 53 Tex. 206; Lake Shore, &c. R. R. Co. v. McCormick, 74 Ind. 440; Wabash, &c. R. R. Co. v. Fenton, 12 Brad. (Ill.) 417; Muldowney v. Illinois Central R. R. Co., 36 Iowa, 462; Jones v. New York Central, &c. R. R. Co., 22 Hun (N. Y.), 284; Louisville & Nashville R. R. Co. v. Orr, 84 Ind. 50; Palmer v. Denver & Rio Grande R. R. Co., 3 McCrary (U. S. C. C.), 635; Missouri Pacific R. R. Co. v. Lyde, 57 Tex. 505; Wedgewood v. Chicago & Northwestern R. R. Co., 44 Wis. 44; Chicago & Alton R. R. Co. v. Mahoney, 4 Brad. (Ill.) 262.

¹ Atchison, &c. R. R. Co. v. Plunkett, 25 Kan. 238; Cowles v. Richmond, &c. R. R. Co., 84 N. C. 309; 37 Am. Rep. 620.

where the defect is obvious, if he puts himself in a position to be injured through it, the fault and the consequences are his own.¹ But it is not necessarily negligence in an employé, when called upon to do an act suddenly and quickly, not to see a patent defect. Thus, a brakeman called upon to connect cars has a right to presume that the bumpers and all the appliances for connecting the cars are in a proper and safe condition; and if he rushes in to connect the cars when such appliances are in an unsafe condition, which he might have seen if he had taken time to examine them, his act cannot be said to be *per se* negligent.² Under such circumstances he has a right to assume that the company has discharged its duty, and is not bound to stop to look to see whether the bumpers or other appliances are safe.³ To hold that an employé in a sudden emergency must stop to deliberately inspect the appliances with which he has to deal, would be to apply to him a rule which could not be practically applied. And where the danger is not patent, he has a right to presume that the master has discharged his duty, and that the appliances of the business are reasonably safe and free from hazard.⁴ The rule announced in a case previously cited,⁵ as applied

¹ In *Hathaway v. Mich. Central R. R. Co.*, 51 Mich. —, a failure by an employé engaged in coupling cars to examine as to the nature of "deadwoods" upon cars with which he had to do, was held contributory negligence preventing a recovery against the company employing him, for injury from such "deadwoods" while at work. *Davis v. Detroit & M. R. R. Co.*, 20 Mich. 105; *Quincy Mining Co. v. Kitts*, 42 id. 34; *Michigan Cent. R. R. Co. v. Smithson*, 45 id. 212; *Swoboda v. Ward*, 40 id. 423; *Michigan Cent. R. R. Co. v. Smithson*, 45 Mich. 212; *Chicago & N. W. R. R. Co. v. Bayfield*, 37 id. 205. See also *Mad River, &c. R. R. Co. v. Barber*, 5 Ohio St. 541; *Davis v. Detroit & M. R. R. Co.*, 20 Mich. 105; *Indiana B. & W. R. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Chicago, R. I., & P. R. R. Co.*, 50 Iowa, 680; *Way v. Illinois Cent. R. R. Co.*, 40 id. 341; *Chicago & N. W. R. R. Co. v. Ward*, 61 Ill. 131.

² *King v. Ohio, &c. R. R. Co.*, 14 Fed. Rep. 277.

³ *Fort Wayne, &c. R. R. Co. v. Gilderleeve*, 33 Mich. 133; *Botsford v. Michigan, &c. R. R. Co.*, 33 id. 256; *Totten v. Penn. R. R. Co.*, 11 Fed. Rep. 564; *Bryden v. Stewart*, 2 Macq. (Sc.), 30; *Dixon v. Rankin*, 14 Court of Sess. Cas. (Sc.) 420; *Roberts v. Smith et al.*, 2 H. & N. 213; *Williams v. Clough*, 3 H. & N. 259; *Mad River & Erie R. R. Co. v. Barber*, 5 Ohio St. 541.

⁴ *Michigan, &c. R. R. Co. v. Dolan*, 32 Mich. 510; *Speed v. Atlantic, &c. R. R. Co.*, 71 Mo. 303. Whether or not a railway company is guilty of negligence in failing to inspect and repair a car of another company passing over its road, such as would render it liable to an employé for injuries sustained by reason of such car becoming out of repair on its passage over the road, in a particular which would have been disclosed by an inspection conducted with ordinary care, is a question for the jury. *Brann v. Chicago, Rock Island, &c. R. R. Co.*, 53 Iowa, 595. It is its duty to exercise ordinary care for the inspection of

⁵ *Potts v. Plunkett*, 9 Ir. C. L. 290.

to the facts of that case, cannot be sustained either upon principle or authority. The plaintiff was injured by a fall occasioned by the

its own locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required. *Smoot v. Mobile, &c. R. R. Co.*, 67 Ala. 18. It is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake which were discoverable upon a reasonable inspection. The inspector represents the company, and is not a fellow-servant of the brakeman. *Long v. Pacific R. R. Co.*, 65 Mo. 225. But in some cases it is held that a notice of the defect to the car-inspector and master-mechanic would only tend to show negligence of duty on their part, and being fellow-servants of the plaintiff, no cause of action could be based on such negligence. *Kidwell v. Houston, &c. R. R. Co.*, 3 Woods (U. S. C. C.), 313; *Smith v. Potter*, 46 Mich. 258. *Engines and other machinery used in operating a railway are liable to become defective and dangerous, and every corporation employing such agencies is charged with notice of this fact, and is bound to exercise a degree of watchfulness commensurate with the nature of its business, and the consequences incident to neglect.* Frequent examinations or other measures of precaution are necessary to prevent engines and machinery from becoming defective and dangerous from natural causes; and consequently as to such agencies the company is bound to active diligence. *Atchison, &c. R. R. Co. v. Holt*, 29 Kan. 149; *Flannagan v. Chicago, &c. R. R. Co.*, 50 Wis. 462; *Smith v. St. Louis, &c. R. R. Co.*, 69 Mo. 32. The rule is that *an employé who knows, or by the exercise of ordinary diligence could know*, of any defects or imperfections in the cars or machinery about which he is employed, and continues in the service without objection, is presumed to have assumed all the consequences from such defects, and to have waived all right to recover for injuries caused thereby. *Muldowney v. Illinois Central R. R. Co.*, 39 Iowa, 615; *Way v. Illinois Central R. R. Co.*, 40 Iowa, 341; *Houston & Texas Central R. R. Co. v. Myers*, 55 Tex. 110; *Baker v. Western & Atlantic R. R. Co.*, 68 Ga. 699; *Johnson v. Western & Atlantic R. R. Co.*, 55 Ga. 133; *Le Clair v. St. Paul & Pacific R. R. Co.*, 20 Minn. 1; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Chicago, &c. R. R. Co. v. Munroe*, 85 Ill. 25; *Illinois Central R. R. Co. v. Jones*, 11 Brad. (Ill.) 324. In such cases the real question is whether the servant has had opportunities with his employer for observing the defective machinery or materials, and intends to waive any objection to them. *Dale v. St. Louis, &c. R. R. Co.*, 63 Mo. 455. He is not under the same obligation as the employer to resort to means to discover defects, and has a right to presume that his employer has done his duty and complied with the law; therefore it is only when he has knowledge of defects in machinery, which he continues to use without objection, that he is presumed to have waived the defects. It is his *knowledge*, and not his *means of knowledge*, that affects his right to recover. *Muldowney v. Illinois Central R. R. Co.*, 36 Iowa, 462; *Porter v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 160; *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. If he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases. *Crutchfield v. Richmond, &c. R. R. Co.*, 78 N. C. 300. And the fact that an employé knows, or could know, by ordinary care, of defects in the appliances *about which he works*, which render his employment more than ordinarily hazardous, and still remains in the employment until he is injured, tends to show contributory negligence, but is not conclusive of such negligence. *Perigo v. Chicago, &c. R. R. Co.*, 55 Iowa, 326. He waives all right to recover for injuries caused thereby; and this waiver cannot be affected by the particular situation in which he may be placed, or the rapidity and promptness with which he is required to act at the time of the injury. *Perigo v. Chicago, &c. R. R. Co.*, 52 Iowa, 276. But the fact that the machinery which caused the injury was open to the plaintiff's inspection, and was so worn as to be

breaking of a flagstone in a landing over which the plaintiff was obliged to pass in the performance of his service to the defendant. The defendant himself directed the manner of laying the flag, which the declaration alleged was defective and insufficient. It did not appear, however, that the master *knew* of the defect, and upon this ground the court held that no recovery could be had. The negligence alleged consisted not only in the selection of a stone too thin for the purpose, but also in neglecting to furnish any under support to the stone.¹ Now, it would seem that it was the duty of the master to exercise proper care in the selection of a stone of suitable thickness and strength for the purpose, and also to provide suitable supports therefor, and that the servant had a right to presume that

more than ordinarily dangerous, will not necessarily defeat a recovery where it was a matter of skill and judgment to know how much wear it would stand. *Bridges v. St. Louis, &c. R. R. Co.*, 6 Mo. App. 389. In the absence of proof that the plaintiff was in charge of the car at the time of the injury, except so far as is implied in his service as brakeman, or had any duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it. *Wedge-wood v. Chicago & Northwestern R. R. Co.*, 44 Wis. 44; *Phila., &c. R. R. Co. v. Schertle*, 97 Penn. St. 450; *Baltimore & Ohio R. R. Co. v. State*, 41 Md. 268. A brakeman injured by coupling a damaged car cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read. But a charge of the court assuming as matter of law that the placing of a car on a side track, or marking on it "out of order," was sufficient to charge an ordinary man engaged in coupling it with notice of its damaged condition and the consequent extra risk of coupling it, is erroneous. *Watson v. Houston, &c. R. R. Co.*, 58 Tex. 434. It is for the jury to say whether the insufficiency of employés, the dangerous character of the frog and brake-beam, being known to the injured party, were defects so glaringly dangerous that a man of prudence would not have undertaken the work, or whether he might reasonably suppose himself able to do the work safely by

the exercise of great care and caution. *Stoddard v. St. Louis, &c. R. R. Co.*, 65 Mo. 514. If a person of ordinary prudence would not have believed the defects dangerous, he may disregard them. *Colorado, &c. R. R. Co. v. Ogden*, 3 Col. 499.

¹ *Chicago & Northwestern R. R. Co. v. Schenring*, 4 Brad. (Ill.) 533. It is error to charge that a railroad company is bound to protect its servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result. *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex. 505. It is not negligence in the employer if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or for an external apparent one, produced by time and use, not brought to the master's knowledge. A different rule, however, prevails where the tool or machinery is perishable. *The master is bound to know that such tool or machinery will only last a limited time, and it is his duty to renew instruments of this character at proper intervals.* *Baker v. Allegheny Valley R. R. Co.*, 95 Penn. St. 211; *Painton v. Northern Central R. R. Co.*, 83 N. Y. 7. It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose. *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Smith v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 42 Wis. 520.

the master had discharged his duty in this respect; and that he, the servant, could not be expected to guard against latent defects either in the stone or the manner of its support. It is true, as previously stated, that as to all patent defects, the servant must exercise his own judgment; but this cannot be extended, either in justice or upon principle, to latent or hidden defects. The servant cannot be expected to exercise more skill or judgment than the master, and when the master laid down the stone, or directed it to be laid down, in the manner and situation he did, the servant was justified in believing that the stone was a proper one to be laid there, and that it was laid in a proper manner, and he could not be held chargeable with negligence in trusting himself upon the stone in the manner detailed in the declaration; and, with all due respect to the court it seems to us that the declaration *did* set forth a cause of action, and that the question of negligence on the part of the master should have been submitted to the jury.¹ The error of the court arose from the application of a wrong principle. It proceeded upon the ground that the master was entitled to notice of the defects in the stone; *but this rule only applies where the master, in the first instance, has provided suitable and proper appliances for the business.* That fact appearing in favor of the master, he is then entitled to notice of the defect, unless the circumstances are such that negligence is fairly imputable to him for not knowing it,² and these are all questions of fact for the jury.³

SEC. 371. Remaining in Service after knowledge of Defects, not Negligence per se.—The servant, although he may know that the instrumentalities of the business are not in good repair or condition, is not thereby necessarily chargeable with negligence in remaining in the master's employ and using them, unless real danger therefrom is apparent. In all cases where there is any doubt, the question is for the jury.⁴ And the principal inquiry is, whether the defect was such that, as a prudent man, he was bound not to accept the risks

¹ *Horner v. Nicholson*, 56 Mo. 220. See also *Malone v. Hawley*, 46 Cal. 409, in which the rule was correctly stated thus, where the injury arose from a defective hoisting-tackle. "The master is liable, if the method of attaching the hoisting-rope was unsafe, and the injury resulted from such defect, if the defendant *knew or ought to have known* of the defect, and the plaintiff had not equal means of knowledge." *Dolan v. R. R. Co.*, 32 Mich. 510; *McLaren v. Stark*, 10 Ct. of Sess. (Sc.) 31.

² *Noyes v. Smith*, 28 Vt. 59; *Columbus R. R. Co. v. Troesch*, 68 Ill. 545.

³ *Clarke v. Holmes*, 7 H. & N. 348; *Lanning v. R. R. Co.*, 49 N. Y. 251; *Patterson v. R. R. Co.*, 76 Penn. St. 318; *Snow v. R. R. Co.*, 8 Allen (Mass.), 461.

⁴ *Clarke v. Holmes*, 7 H. & N. 348; *Greenleaf v. R. R. Co.*, *ante*; *Patterson v. R. R. Co.*, 76 Penn. St. 318; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441.

incident thereto. Thus, in a Massachusetts case,¹ the plaintiff was employed as a watchman in their machine-shop. A portion of the floor over which he had to pass in the discharge of his duties had for a long time been in a state of decay, and had become unsafe. The plaintiff knew that portions of the floor were decayed, and that there were several holes in it, but the actual condition of the floor, in that respect, was not known to him, nor did it appear that he could have ascertained that the place he broke through was dangerous, unless he examined portions of the floor not open to inspection. The defendants knew, or might have known by reasonable care, the dangerous condition of the floor. The plaintiff, in consequence of the defective condition of the floor, while in the course of his employment broke through the floor and was injured. It was held that the question as to whether the plaintiff was negligent in remaining in the defendant's employ, with the knowledge he had of the condition of the floor, was a proper question for the jury, and was not a question of law for the court.

SEC. 372. Servant must exercise his Judgment. — When a servant is employed upon work, which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. *A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety.* He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant.²

SEC. 373. What Care Company must exercise. — The company is bound to use reasonable care to prevent accidents to its employes, and to this end, is bound to furnish suitable machinery and appliances, and use a like reasonable care in keeping them in proper repair; as the risks assumed by the employes do not extend to those

¹ *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

² *McEwing v. Waterford, &c. Ry. Co.*, 8 Ir. C. L. 389. If the master *ought* to have known that the instrumentalities of the business were defective or unsafe; that is, if by the exercise of ordinary care he would have known it, he is liable

for injuries resulting from such defects. *Williams v. Clough*, 3 H. & N. 258; *Stone v. Mfg. Co.*, 4 Oreg. 52; *Michigan, &c. R. R. Co. v. Dolan*, 33 Mich. 510; *Stark v. Patterson*, 5 Phil. (Penn.) 225; *Owen v. N. Y. Central R. R. Co.*, 1 Lam. (N. Y.) 108.

which are brought about by the negligence of the company.¹ The same rule applies, whether the appliances of the road were manufactured by the company or purchased from a manufacturer.² Where cars come into its trains from other roads, the better doctrine seems to be that the company has a right to assume that they are in proper repair and condition; but as will be seen by the cases cited below, the doctrine is by no means uniform or settled.³ A railway

¹ *Lake Shore, &c. R. R. Co. v. Fitzpatrick*, 31 Ohio St. 474; *Muldowney v. Ill. Central R. R. Co.*, 36 Iowa, 462; *Fifield v. Northern R. R. Co.*, 42 N. H. 225. In *Ellis v. N. Y., Lake Erie, &c. R. R. Co.*, N. Y. Ct. of Appeals, 1884, an action was brought to recover for the death of the plaintiff's intestate, a brakeman employed by the defendant, who, seeing the imminence of a collision between the freight train on which he was employed, and one approaching it from the rear, went out of the front door of the caboose attached to the end of his train and attempted to escape, but was caught between the caboose and the next car and received fatal injuries. It was claimed that the result was due to the fact that the "buffer" on the caboose was so much lower than that of the preceding car that the caboose was driven under the bumper-block of the car ahead, and thus the theory of the action was that the cars and appliances furnished the deceased by the defendant were unsafe and unsuitable, and that this act constituted negligence that would authorize recovery. It was held that it was the duty of the defendant to provide a car properly fitted, not only with running apparatus, — as wheels, stopping-apparatus, as a brake, — but with buffers of some kind, to protect the car and its servants, necessarily or lawfully thereon, from the effect of a collision. *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532; 45 Am. Rep. 268; *Dana v. N. Y. C. R. R. Co.*, 92 N. Y. 639; *Sheehan v. N. Y. Central R. R. Co.*, 91 id. 332; *Durkin v. Sharp*, 88 id. 225; *Booth v. B. & A. R. R. Co.*, 73 id. 38; 29 Am. Rep. 97; *Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607; *Flike v. B. & A. R. R. Co.*, 53 id. 550; 13 Am. Rep. 545.

² *Toledo, &c. R. R. Co. v. Ingraham*, 77 Ill. 309; *Ford v. Fitchburg R. R. Co.*,

110 Mass. 240; *Chicago, &c. R. R. Co. v. Jackson*, 55 Ill. 492; *Hough v. Texas, &c. R. R. Co.*, 100 U. S. 213; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420.

³ *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 250. One railroad company receiving a loaded car from another, and running it upon its own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. See *Wedgewood v. Railroad Co.*, 41 Wis. 478; *Smith v. Railroad Co.*, 42 id. 520; *Morrison v. Railroad Co.*, 44 id. 405; *Steffen v. Railroad Co.*, 46 id. 265; *Railroad Co. v. Hightower*, 92 Ill. 139; *Indianapolis, &c. R. R. Co. v. Toy*, 91 id. 474; *DeGraff v. Railroad Co.*, 76 N. Y. 125; *Warner v. Indianapolis, &c. R. R. Co.*, 39 id. 468; *Baldwin v. Railroad Co.*, 50 Iowa, 680; *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Gildersleeve*, 83 id. 133; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541. But in *O'Neil v. St. Louis, &c. R. R. Co.*, 9 Fed. Rep. 337, a contrary doctrine was held, and where an accident occurred to an employé in consequence of the introduction of a foreign and defectively constructed car into the train on which he was employed, it was held that he might maintain an action of damages against the company therefor. *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212. In a New York case, on a dark night, when snow was on the ground, the plaintiff, a brakeman, was sent to couple together two cars in a freight train which had broken apart. The defendant had three rails laid to enable it to run broad and narrow gauge cars in the same train. Freight cars usually have upon their ends pieces of wood, called bumpers, extending six or eight inches beyond the car, so that if the draw-heads pass each

company is not held to the exercise of extraordinary care, as in the case of passengers, but is only required to furnish such appliances as

other the shock is received by the buffers, and a brakeman, if he be between the cars, will be uninjured. One of the cars which the plaintiff was to couple was a broad-gauge and the other a narrow-gauge car. The buffers only extended three inches beyond the car. These cars did not belong to the defendant. The draw-heads passed each other and the plaintiff was injured. It was held that the question of the defendant's negligence in failing to have proper bumpers upon the cars used by it was properly submitted to the jury, and that a verdict in favor of the plaintiff would not be disturbed. *Gottlieb v. New York, Lake Erie, & Western R. R. Co.*, 29 Hun (N. Y.), 637. In a Minnesota case the defendant received into its service from another railway company a freight-car which proved to be in bad order, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car, was severely injured in consequence of its defective condition, which was not known to him, but was discoverable on proper inspection. It was held, that, as respects such defects, the company was answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. *Fay v. Minneapolis, &c. R. R. Co.*, 30 Min. 231; *St. Louis, &c. R. R. Co. v. Valirius*, 56 Ind. 511. The rule may be said to be that if a railway company permits a defective and dangerous car to come into its yards or upon its tracks, and remain for so many days that it might, by the exercise of proper diligence, discover its condition, and if, from the want of such diligence, an injury happen to an employé, who was exercising due care, the company will be liable, although it does not own the car. *Chicago & Alton R. R. Co. v. Bragonier*, 11 Brad. (Ill.) 516. But a railway company receiving a loaded car from another road and running it upon its own line is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all

parts of the car which appear to be in good condition are so in fact. *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. Nor can it be said to be negligent for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. *Baldwin v. Chicago, &c. R. R. Co.*, 50 Ia. 680. A statutory requirement that every railway shall impartially and diligently receive and forward the cars of other lines does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Smith v. Potter*, 46 Mich. 258. A section-master in temporary charge of a hand-car must note such defects in it as are discernible in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it, if it be obviously unsafe; otherwise he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer as well as to his own credit. *Georgia R. R. & Banking Co. v. Kenney*, 58 Ga. 485; *Kenney v. Central R. R. & Banking Co.*, 61 id. 590; *Central R. R. Co. v. Kenney*, 64 id. 100; *East Tenn., &c. R. R. Co. v. Smith*, 9 Lea (Tenn.), 685. Where an employé was injured by a defect in a hand-car, and the defect was apparent, the employé is presumed to have assumed the risk. But if the danger was greater than could be discovered by the use of ordinary care, then the employer was in default when the injury was produced in a manner not anticipated. *International, &c. R. R.*

are reasonably calculated to insure the safety of its employés.¹ The servant has a right to assume that the machinery and implements furnished are suitable for the business, and except as to patent and obvious defects he has a right to rely upon it that the company has discharged its duty, and is not himself required to inspect them to ascertain whether they are in fact suitable.² Nor is the company responsible for an injury resulting from defective appliances, unless it has been guilty of negligence in ascertaining the defect. Thus, if the coupling of a freight-car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employé, received in consequence thereof, *unless its attention had been called to the defect, or the company, by the exercise of a reasonable degree of care, could have discovered the defect, and had an opportunity to make the needed repairs.*³

Co. v. Doyle, 49 Tex. 190; Barringer v. Delaware & Hudson Canal Co., 19 Hun (N. Y.), 216. It is gross negligence for a railway company to run its trains on a dark night without a headlight. Burling v. Illinois Central R. R. Co., 85 Ill. 18. In an action by one injured by the giving way of a hoisting-apparatus, used in connection with a train of the company, it appeared that the plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. It was held that the conductor was a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company, and render it responsible. But if he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise. McGowan v. St. Louis, &c. R. R. Co., 61 Mo. 523.

¹ Cooper v. Central R. R. Co. 44 Iowa, 134.

² Porter v. Hannibal, &c., R. R. Co., 71 Mo. 66; Evans v. Lake Shore, &c.

R. R. Co., 12 Hun (N. Y.), 289; King v. Ohio, &c. R. R. Co., 14 Fed. Rep. 277.

³ Indianapolis, Bloomington, & Western R. R. Co. v. Flanigan, 77 Ill. 365. In Steffen v. Railway Co., 46 Wis. 265, the court said: "There may be latent risks in an employment. Where these are known to the master it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In East St. Louis, &c. R. R. Co. v. Hightower, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge or might have had knowledge of the defect by the use of reasonable diligence." Indianapolis, &c. R. R. Co. v. Toy, 91 Ill. 474. In De Graf v. New York Central R. R. Co., 76 N. Y. 125, a brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake-chains to see if they were in their place and apparently sound, but did not test their strength." The court, from all the evidence, held that

SEC. 374. Duty to inspect Appliances. — Of course it is the duty of a railway company to inspect and test its appliances at reasonable periods, and it is bound to know that they will by constant use become defective; but where any of the appliances of the business are apparently safe, and the servants using them make no complaint, and do not call their attention to any defects therein, it cannot be held responsible for an injury resulting from a defect suddenly appearing, unless it has been remiss in testing the appliance; which can only be said to be the case when its attention has been called thereto, or when it has been in use so long, and under such circumstances, that it is

the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that the defect could have been discovered by the exercise of ordinary care, or that such care was not used; and that therefore a refusal to nonsuit was error. In *Warner v. Erie R. R. Co.*, 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. And it may be said that the authorities establish the rule that where the injury is the result of a *latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care*, the master will not be held liable. In *Baldwin v. Chicago, &c. R. R. Co.*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment." In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich. 105. A rail-

road company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. Wayne, &c. R. R. Co., v. Gildersleeve*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon inter-State commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employé, and the result of the neglect of that ordinary and reasonable care and diligence, in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *Mad River, &c. R. R. Co. v. Barber*, 5 Ohio St. 541. In *Smith v. Railway Co.*, 42 Wis. 520, the brake-staff or rod on a wood train broke just below the cog-wheel near the top of the car, on account of an old crack or seam therein, in consequence of which the brakeman was thrown from the car and injured. The plaintiff had a verdict, but the Supreme Court set it aside upon the ground that there was no evidence to show that the company had been guilty of any negligence in not applying a proper and sufficient test to the brake-rod. And the same rule was applied in *Morrison v. Construction Co.*, 44 Wis. 405, where an injury resulted from the breaking of the wheel of a car.

bound to know that it must in the ordinary course of things have become unsafe. Thus, in a Pennsylvania case,¹ the plaintiff's intestate was killed by the breaking of a derrick rope which he was using while in the defendant's employ. It appeared that the rope had been in use for three years. The court held that an employer should know that a rope used for three years is no longer safe, and that he is responsible for an injury caused, by the breaking of such a rope, to an employé who did not know the facts. SHARSWOOD, J., said: "The duty which the master owes to his servants is to provide them with safe tools and machinery, when that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use, it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself.² But do these rules apply to such an instrument as a rope used in a derrick which is employed in raising heavy weights? No doubt a perfectly new rope, and one to all appearance sound, may break, and the master would not be responsible for the consequences, having furnished a rope of the proper size for the purpose, to all appearances sound. But there was evidence in this case, sufficient certainly to make a question for the jury, that such a rope, after having been used for a year or more, and exposed during that time as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope, under such circumstances, will only last a limited time. It will not do for him to furnish a sound rope, and then fold his arms until, by actually breaking, it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that, after such a time he ought to provide a new rope. Is the servant bound to notify the master of that which he knows or ought to know without such information? He knows how long the rope has been in use.

¹ *Baker v. Allegheny R. R. Co.*, 95 Penn. St. 211; 40 Am. Rep. 634.

² *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384.

The servant may not know. In this case the deceased did not know; it appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it."

SEC. 375. *Degree of Care required of the Master.*—The proposition may be stated broadly that in no case can the master be held chargeable for an injury resulting to his servant from defects in the machinery or other appliances of the business, unless negligence or fault can be imputed to him.¹ The master's liability is based upon his personal negligence; hence, in all cases the evidence must establish personal fault, or what is equivalent thereto on his part.² He is bound to exercise reasonable care in the choice of the instrumentalities of his business, and the specific degree of care that he must exercise is measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed;³ and therefore the question of negligence on his part is essentially a question for the jury in each case,⁴ and is to be ascertained in view of the circumstances of the case.⁵ A person employing a servant in a powder-mill, where the slightest friction of machinery would probably result in an explosion of the works, and involve serious injury if not instant death to the servant, would be held to a much higher degree of care in the selection of machinery, and watchfulness over it, than one who was engaged in a less hazardous business, and where the consequences of neglect in those respects would be less serious. What would be due care in reference to one class of business might be gross negligence in another. The master is bound to furnish appliances or instrumentalities as safe and free from latent defects as ordinary care and prudence can provide; and this care must be commensurate with the risks to his servants incident to faulty or defective appliances,⁶ and must be continued while the machinery or

¹ *Clarke v. Holmes*, 7 H. & N. 937; *Bartons-
hill Coal Co. v. Reid*, 3 Macq. (Sc.). 265.

² *Scott, J., in Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Wright v. R. R. Co.*, 25 N. Y. 562; *Keegan v. Western R. R. Co.*, 8 id. 175; *Hayden v. Smithville Co.*, 29 Conn. 548.

³ *Noyes v. Smith*, 28 Vt. 39.

⁴ *Ford v. Fitchburg R. R. Co.*, *ante*; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441.

⁵ *Dixon v. Rankin*, 14 Court of Sessions Cas. (Sc.) 420.

⁶ *Dixon v. Rankin*, *ante*; *Tarrant v. Webb*, 18 C. B. 797; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 238; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Bartons-*

appliances are in use, to see that they are kept in repair and in a safe condition. "It is the duty," say the court in a Maine case,¹ "of every employer to use reasonable precaution for the safety of those in his employment, by providing them with suitable machinery, and keeping it in a condition not to endanger the safety of the employed; and by the same reasoning, bridges, passage-ways or ladders necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer."²

SEC. 376. **Master is presumed to have discharged his Duty.**—The measure of the master's duty is to exercise due care in providing instrumentalities for the servant in the prosecution of the business, and *prima facie* he is presumed to have done so;³ and if he has in fact done so, no liability attaches for defects therein, either in machinery,⁴ materials,⁵ buildings,⁶ or other appliances,⁷ unless negli-

hill Coal Co. v. Reid, 3 Macq. (Sc.), 272; Keegan v. Railroad Co., 8 N. Y. 175; Clarke v. Holmes, 7 H. & N. 937; 6 id. 349; Wigmore v. Jay, 5 Exch. 354; Buzzell v. Laconia, &c. Co., 48 Me. 113; Snow v. Housatonic R. R. Co., 8 Allen (Mass.), 441; Hayden v. Smithville Co., 29 Conn. 548.

¹ Buzzell v. Laconia Mfg. Co., 48 Me. 113.

² In Fifield v. Northern R. R. Co., 42 N. H. 225, the defendant provided a safe road-bed, but during the winter season permitted it to become blocked with snow and ice, and did not use due care to remove it. The plaintiff having been injured in consequence of such obstruction, the company was held chargeable with negligence, and liable therefor. Knowledge of an engineer of defects in an engine is held knowledge of the master. Nashville, &c. R. R. Co. v. Elliott, 1 Cold. (Tenn.) 612. So knowledge of a foreman whose duty it is to repair, is knowledge of the master. Brabbits v. Chicago, &c. R. R. Co., 37 Wis. 290. See also Baldwin v. Cassella, L. R. 7 Exch. 325. In Snow v. Housatonic R. R. Co., 8 Allen (Mass.),

440, the plaintiff was injured while uncoupling cars, by reason of defects in the road-bed. It was held that, as these defects were the result of original construction, the defendants were chargeable with negligence, and consequently with liability. Ryan v. Fowler, 24 N. Y. 410; Seaver v. Boston & Maine R. R. Co., 14 Gray (Mass.), 466; Cayzer v. Taylor, 10 id. 274; Keegan v. Western R. R. Co., 8 N. Y. 175; King v. Boston & Worcester R. R. Co., 9 Cush. (Mass.) 112; Park v. O'Brien, 23 Conn. 339; Norris v. Litchfield, 35 N. H. 271; Wright v. N. Y. C. R. R. Co., 25 N. Y. 562; Brydon v. Stewart, 2 Macq. (Sc.), 30.

³ Hard v. R. R. Co., 32 Vt. 473. "The legal implication is," say the court in Gibson v. R. R. Co., 46 Mo. 163, 2 Am. Rep. 497, "that the employer will adopt suitable instruments and means with which to carry on his business; and where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew or might have known by the exercise of reasonable care, that the apparatus

⁴ Hard v. R. R. Co. *ante*; Noyes v. Smith, 28 Vt. 59.

⁵ Tarrant v. Webb, 8 C. B. 797; Railroad Co. v. Webb, 12 Ohio St. 475; Wigmore v. Jay, 5 Exch. 354.

⁶ Malone v. Hathaway, *ante*.

⁷ Warner v. Erie R. R. Co., 39 N. Y. 468; Wilson v. Merry, L. R. 1 S. & D. 326.

gence can be imputed to him in reference to their examination and repair.¹ (Thus, where a railroad company builds its road, lays its rails, erects its bridges, and stocks it with machinery and cars, it is presumed to have done so with due care, and is not liable to a servant for any defects therein, unless negligence can in fact be shown in reference to the particular matter producing the injury.²) Therefore, if a servant is injured by defects in the instrumentalities of the business, he must show *some* fault on the part of the master, as that he did not use ordinary care in providing them originally,³ or that he did not exercise such care in keeping them in repair;⁴ and the fact that the defect might have been ascertained by proper examination and care on the master's part, is sufficient evidence of negligence to charge him with liability;⁵ and he cannot screen himself from liability upon the ground that *he did not know* of the defect, if by ordinary care he would have known of it. *He is bound to know.*⁶

SEC. 377. *Liable for Acts of Agents when.* — It is its duty to use reasonable care in the selection of all the appliances of its business, and as this is a duty which the company owes to the servant, it can-

was unsafe. He is not bound to furnish absolutely safe instrumentalities. If he uses due care in that respect, his duty is discharged." *Riley v. Baxendale*, 6 H. & N. 445. The injury must be attributable to the master's neglect. *Brydon v. Stewart*, 2 Macq. (Sc.), 30; *Williams v. Clough*, 3 H. & N. 259; *Roberts v. Smith*, 2 id. 213; *Marshall v. Stewart*, 33 Eng. Law & Eq. 1; *Paterson v. Wallace*, 1 Macq. 748; *Ormond v. Holland*, 1 Ellis, B. & E. 102.

¹ *Chicago, &c. R. R. Co. v. Sweet*, 45 Ill. 197. See also *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Plank v. R. R. Co.*, 60 N. Y. 607.

² *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Faulkner v. Erie R. R. Co.*, 40 Barb. (N. Y.) —. *Indianapolis R. R. Co. v. Love*, 10 Ind. 553; *Moss v. Johnson*, 22 Ill. 563; *Seaver v. Boston, &c. R. R. Co.*, 14 Gray (Mass.), 466.

³ *Williams v. Clough, ante*; *Patterson v. R. R. Co.*, 76 Penn. St. 389. When an injury results from a defect in machinery, which was constructed for the master, it is not enough to show that the machine was defectively constructed, but it must also appear that the master did not exercise due care in selecting competent persons to

construct it. *Potts v. Port Carlisle, &c. R. R. Co.*, 8 W. R. 524.

⁴ *Johnson v. Bruner*, 61 Penn. St. 58. *McMahon v. Davidson*, 12 Minn. 357; *Columbus, &c. R. R. Co. v. Webb*, 12 Ohio St. 475. "A railroad company," say the court, in *Nashville R. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611, "is bound to see that its road is in good condition and safe, and that the engines are perfect, and properly constructed according to the present improvements in the art; and also to have competent engineers; and if an injury is occasioned to an employé by an imperfection in the road or machinery, the company will be held responsible, provided it had knowledge of such defect, or in the exercise of ordinary care might have known it; and the knowledge of such defect by an engineer employed by the company is knowledge on the part of the company."

⁵ *Dixon v. Rankin*, 14 Court of Sess. (Sc.) 420; *Williams v. Clough, ante*; *Plank v. R. R. Co.*, 60 N. Y. 607; *Warner v. R. R. Co.*, 39 id. 458.

⁶ *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548; *Hayes v. Smith*, 23 Vt. 59; *Ryan v. Fowler*, 24 N. Y. 410.

not relieve itself from responsibility by showing that it had delegated the duty to a competent agent. The duty is positive and must be fulfilled strictly,¹ the rule being that, where a master owes certain duties to his servant, he is liable for the manner in which

¹ Chicago, &c. R. R. Co. v. Taylor, 69 Ill. 461; Chicago, &c. R. R. Co. v. George, 19 Ill. 510; Illinois Central R. R. Co. v. Jewell, 46 Ill. 99; Ford v. Fitchburg R. R. Co., 110 Mass. 240; Besel v. N. Y. Central R. R. Co., 70 N. Y. 171; Huntington, &c. R. & Coal Co. v. Decker, 82 Penn. St. 119; Brickner v. N. Y. Central R. R. Co., 2 Lans. (N. Y.) 506; Laning v. N. Y. Central R. R. Co., 49 N. Y. 521; Booth v. Boston, &c. R. R. Co., 73 N. Y. 38; Harvey v. N. Y. Central R. R. Co., 19 Hun (N. Y.), 556; Flike v. Boston, &c. R. R. Co., 53 N. Y. 564; Gunter v. Graniteville Mfg. Co., 18 S. C. 262. In Mitchell v. Robinson, 80 Ind. 281, it appeared that the appellant, who resided in Kentucky, had formed a partnership for the purpose of buying and slaughtering hogs in New Albany, Indiana, on the premises where the appellee was hurt, one of the appellants being the owner of the premises. At the time of the accident, they were engaged in preparations for commencing the business. The defendants were not personally present, and had no notice of the defective condition of the boiler. They had employed one Jones as a general superintendent of their proposed business, and in that capacity he was present, superintending the said preparations, and had engaged the appellee to come and go to work as a common laborer on the day when he was injured. He came accordingly, in the morning, and was preparing to go to work, but Jones had not yet arrived, when the explosion took place. Some days before, Jones had been notified by one who had been employed to clean the boiler and had been in it for that purpose, that the boiler was unsafe; that there was a crack in the head of it more than a foot long. In support of their claim that Jones and the appellee were fellow-servants, and that the appellee could have no recourse upon the master for an injury caused by the negligence of Jones to notify the master of the defective

condition of the boiler, the following cases were cited: Columbus, &c. R. R. Co. v. Arnold, 31 Ind. 174; Wright v. N. Y. C. R. R. Co., 25 N. Y. 562; Hayden v. Smithville Mfg. Co., 23 Conn. 548; Roberts v. Smith, 2 H. & N. 213; Wigmore v. Jay, 5 Exch. 354; Keegan v. Western R. R. Co., 8 N. Y. 175; Ormond v. Holland, Ell., B., & E. 102. The case, however, was held not to come within the principle contended for, as applicable to fellow-servants engaged in the same employment, but rather within the rule that a general agent employed to represent the master in his absence, and charged with the duties which it would be incumbent on the master to perform if he were present, is not a mere fellow-servant, whose negligence can impose no liability upon the master to an injured subordinate. The owner of mills or machinery, which men are employed to operate, owes duties to the employés which he cannot escape by absenting himself and committing the entire charge to an agent. Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369, where it is shown that the individual who does act by an agent, as well as a corporation which can act in no other way, is responsible for the neglect of the general agent so employed. To the same effect are Gormly v. Vulcan Iron Works, 61 Mo. 492; Shanny v. Androscoggin Mills, 66 Me. 420; Cumberland, &c. R. R. Co. v. State, 44 Md. 283; Cumberland, &c. R. R. Co. v. State, 45 id. 229; Brabbitts v. Chicago, &c. R. R. Co., 38 Wis. 289. This is in harmony with the cases in which it is held that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation. Pittsburgh, &c. R. R. Co. v. Ruby, 38 Ind. 294; Ohio, &c. R. R. Co. v. Collarn, 73 id. 261; 38 Am. Rep. 134; Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573; Murphy v. Smith, 19 C. B. (N. S.) 361.

that duty is discharged, through whatever agency he acts.¹ Therefore if a railway company delegates to an employé the duty of inspecting the machinery and appliances of the road, *while engaged in the discharge of that duty he is acting not only for, but as the company; and his negligence in that respect is the negligence of the company.*² It is said in some of the text-books,³ and in some of the cases,⁴ that in all cases where the master has committed the entire control or management of his business to another, reserving no discretion or control to himself, the person to whom such power is delegated stands in the place and stead of the master, so that his acts are, in law, the acts of the master.⁵ But this rule is difficult of application, and by no means embodies the doctrine advanced by the cases. The instances are rare in which the master, either by himself or some superior servant, does not reserve *some* supervision over every department of his business, or at least reserve such a right in himself; and if the rule was to be confined to such narrow limits as a strict application of the letter and spirit of the rule as stated indicates, very few cases would come within its operation; and the rule as now held by the better class of cases may be said to be that *whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent; and to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other*

¹ *Wager v. Railroad Co.*, 55 Penn. St. 473; *Hurd v. Rutland, &c. R. R. Co.*, 32 Vt. 473; *Ford v. Fitchburg R. R. Co.*, *ante*; *Beaulieu v. Portland, &c. R. R. Co.*, 48 Me. 295; *O'Conner v. Roberts*, 120 Mass. 227.

² *Brown v. Chicago, &c. R. R. Co.*, 53 Iowa, 595; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 N. Y. 5; *Booth v. Boston, &c. R. R. Co.*, 73 N. Y. 38; *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 522; *Brickner v. N. Y. Central R. R. Co.*, 2 Lans. (N. Y.) 506; *Kirkpatrick v. N. Y. Central R. R. Co.*, 79 N. Y. 240. In *Stevenson v. Jewett*, 16 Hun (N. Y.), 210, the plaintiff's intestate was a fireman in the defendant's employ, and was killed by the explosion of a boiler of a locomotive. The boiler was

shown to be defective and out of repair. It was also shown that it had been at the repair-shop six months before the explosion, and that the defects in it could have been ascertained upon examination. It was held that the superintendent having charge of the repairs stood in the place of the company, and that any fault on his part was the fault of the company. The plaintiff was nonsuited in the lower court, but the nonsuit was set aside.

³ Wharton on Negligence, § 229.

⁴ *Malone v. Hathaway, ante*; *Mullan v. Steamship Co.*, 78 Penn. St. 26.

⁵ *Corcoran v. Holbrook*, 59 N. Y. 517; *Brickner v. R. R. Co.*, 2 Lans. (N. Y.) 506; affirmed, 49 N. Y. 672; *Malone v. Hathaway, ante*; *Mullan v. Steamship Co., ante*.

which are brought about by the negligence of the company.¹ The same rule applies, whether the appliances of the road were manufactured by the company or purchased from a manufacturer.² Where cars come into its trains from other roads, the better doctrine seems to be that the company has a right to assume that they are in proper repair and condition; but as will be seen by the cases cited below, the doctrine is by no means uniform or settled.³ A railway

¹ *Lake Shore, &c. R. R. Co. v. Fitzpatrick*, 31 Ohio St. 474; *Muldowney v. Ill. Central R. R. Co.*, 36 Iowa, 462; *Fifield v. Northern R. R. Co.*, 42 N. H. 225. In *Ellis v. N. Y., Lake Erie, &c. R. R. Co.*, N. Y. Ct. of Appeals, 1884, an action was brought to recover for the death of the plaintiff's intestate, a brakeman employed by the defendant, who, seeing the imminence of a collision between the freight train on which he was employed, and one approaching it from the rear, went out of the front door of the caboose attached to the end of his train and attempted to escape, but was caught between the caboose and the next car and received fatal injuries. It was claimed that the result was due to the fact that the "buffer" on the caboose was so much lower than that of the preceding car that the caboose was driven under the bumper-block of the car ahead, and thus the theory of the action was that the cars and appliances furnished the deceased by the defendant were unsafe and unsuitable, and that this act constituted negligence that would authorize recovery. It was held that it was the duty of the defendant to provide a car properly fitted, not only with running apparatus, — as wheels, stopping-apparatus, as a brake, — but with buffers of some kind, to protect the car and its servants, necessarily or lawfully thereon, from the effect of a collision. *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532; 45 Am. Rep. 268; *Dana v. N. Y. C. R. R. Co.*, 92 N. Y. 639; *Sheehan v. N. Y. Central R. R. Co.*, 91 id. 332; *Durkin v. Sharp*, 88 id. 225; *Booth v. B. & A. R. R. Co.*, 73 id. 38; 29 Am. Rep. 97; *Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607; *Flike v. B. & A. R. R. Co.*, 58 id. 550; 13 Am. Rep. 545.

² *Toledo, &c. R. R. Co. v. Ingraham*, 77 Ill. 309; *Ford v. Fitchburg R. R. Co.*,

110 Mass. 240; *Chicago, &c. R. R. Co. v. Jackson*, 55 Ill. 492; *Hough v. Texas, &c. R. R. Co.*, 100 U. S. 213; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420.

³ *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 250. One railroad company receiving a loaded car from another, and running it upon its own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. See *Wedgewood v. Railroad Co.*, 41 Wis. 478; *Smith v. Railroad Co.*, 42 id. 520; *Morrison v. Railroad Co.*, 44 id. 405; *Steffen v. Railroad Co.*, 46 id. 265; *Railroad Co. v. Hightower*, 92 Ill. 139; *Indianapolis, &c. R. R. Co. v. Toy*, 91 id. 474; *DeGraff v. Railroad Co.*, 76 N. Y. 125; *Warner v. Indianapolis, &c. R. R. Co.*, 39 id. 468; *Baldwin v. Railroad Co.*, 50 Iowa, 680; *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Gildersleeve*, 33 id. 133; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541. But in *O'Neil v. St. Louis, &c. R. R. Co.*, 9 Fed. Rep. 337, a contrary doctrine was held, and where an accident occurred to an employé in consequence of the introduction of a foreign and defectively constructed car into the train on which he was employed, it was held that he might maintain an action of damages against the company therefor. *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212. In a New York case, on a dark night, when snow was on the ground, the plaintiff, a brakeman, was sent to couple together two cars in a freight train which had broken apart. The defendant had three rails laid to enable it to run broad and narrow gauge cars in the same train. Freight cars usually have upon their ends pieces of wood, called bumpers, extending six or eight inches beyond the car, so that if the draw-heads pass each

company is not held to the exercise of extraordinary care, as in the case of passengers, but is only required to furnish such appliances as

other the shock is received by the buffers, and a brakeman, if he be between the cars, will be uninjured. One of the cars which the plaintiff was to couple was a broad-gauge and the other a narrow-gauge car. The buffers only extended three inches beyond the car. These cars did not belong to the defendant. The draw-heads passed each other and the plaintiff was injured. It was held that the question of the defendant's negligence in failing to have proper bumpers upon the cars used by it was properly submitted to the jury, and that a verdict in favor of the plaintiff would not be disturbed. *Gottlieb v. New York, Lake Erie, & Western R. R. Co.*, 29 Hun (N. Y.), 637. In a Minnesota case the defendant received into its service from another railway company a freight-car which proved to be in bad order, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car, was severely injured in consequence of its defective condition, which was not known to him, but was discoverable on proper inspection. It was held, that, as respects such defects, the company was answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. *Fay v. Minneapolis, &c. R. R. Co.*, 30 Min. 231; *St. Louis, &c. R. R. Co. v. Valirius*, 56 Ind. 511. The rule may be said to be that if a railway company permits a defective and dangerous car to come into its yards or upon its tracks, and remain for so many days that it might, by the exercise of proper diligence, discover its condition, and if, from the want of such diligence, an injury happen to an employé, who was exercising due care, the company will be liable, although it does not own the car. *Chicago & Alton R. R. Co. v. Bragonier*, 11 Brad. (Ill.) 516. But a railway company receiving a loaded car from another road and running it upon its own line is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all

parts of the car which appear to be in good condition are so in fact. *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. Nor can it be said to be negligent for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. *Baldwin v. Chicago, &c. R. R. Co.*, 50 Ia. 680. A statutory requirement that every railway shall impartially and diligently receive and forward the cars of other lines does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Smith v. Potter*, 46 Mich. 258. A section-master in temporary charge of a hand-car must note such defects in it as are discernible in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it, if it be obviously unsafe; otherwise he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer as well as to his own credit. *Georgia R. R. & Banking Co. v. Kenney*, 58 Ga. 485; *Kenney v. Central R. R. & Banking Co.*, 61 id. 590; *Central R. R. Co. v. Kenney*, 64 id. 100; *East Tenn., &c. R. R. Co. v. Smith*, 9 Lea (Tenn.), 685. Where an employé was injured by a defect in a hand-car, and the defect was apparent, the employé is presumed to have assumed the risk. But if the danger was greater than could be discovered by the use of ordinary care, then the employer was in default when the injury was produced in a manner not anticipated. *International, &c. R. R.*

are reasonably calculated to insure the safety of its employés.¹ The servant has a right to assume that the machinery and implements furnished are suitable for the business, and except as to patent and obvious defects he has a right to rely upon it that the company has discharged its duty, and is not himself required to inspect them to ascertain whether they are in fact suitable.² Nor is the company responsible for an injury resulting from defective appliances, unless it has been guilty of negligence in ascertaining the defect. Thus, if the coupling of a freight-car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employé, received in consequence thereof, *unless its attention had been called to the defect, or the company, by the exercise of a reasonable degree of care, could have discovered the defect, and had an opportunity to make the needed repairs.*³

Co. v. Doyle, 49 Tex. 190; Barringer v. Delaware & Hudson Canal Co., 19 Hun (N. Y.), 216. It is gross negligence for a railway company to run its trains on a dark night without a headlight. Burling v. Illinois Central R. R. Co., 85 Ill. 18. In an action by one injured by the giving way of a hoisting-apparatus, used in connection with a train of the company, it appeared that the plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. It was held that the conductor was a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company, and render it responsible. But if he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise. McGowan v. St. Louis, &c. R. R. Co., 61 Mo. 528.

¹ Cooper v. Central R. R. Co. 44 Iowa, 134.

² Porter v. Hannibal, &c., R. R. Co., 71 Mo. 66; Evans v. Lake Shore, &c.

R. R. Co., 12 Hun (N. Y.), 289; King v. Ohio, &c. R. R. Co., 14 Fed. Rep. 277.

³ Indianapolis, Bloomington, & Western R. R. Co. v. Flanigan, 77 Ill. 365. In Steffen v. Railway Co., 46 Wis. 265, the court said: "There may be latent risks in an employment. Where these are known to the master it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In East St. Louis, &c. R. R. Co. v. Hightower, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge or might have had knowledge of the defect by the use of reasonable diligence." Indianapolis, &c. R. R. Co. v. Toy, 91 Ill. 474. In De Graf v. New York Central R. R. Co., 76 N. Y. 125, a brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake-chains to see if they were in their place and apparently sound, but did not test their strength." The court, from all the evidence, held that

SEC. 374. Duty to inspect Appliances. — Of course it is the duty of a railway company to inspect and test its appliances at reasonable periods, and it is bound to know that they will by constant use become defective; but where any of the appliances of the business are apparently safe, and the servants using them make no complaint, and do not call their attention to any defects therein, it cannot be held responsible for an injury resulting from a defect suddenly appearing, unless it has been remiss in testing the appliance; which can only be said to be the case when its attention has been called thereto, or when it has been in use so long, and under such circumstances, that it is

the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that the defect could have been discovered by the exercise of ordinary care, or that such care was not used; and that therefore a refusal to nonsuit was error. In *Warner v. Erie R. R. Co.*, 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. And it may be said that the authorities establish the rule that where the injury is the result of a *latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care*, the master will not be held liable. In *Baldwin v. Chicago, &c. R. R. Co.*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment." In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich. 105. A rail-

road company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. Wayne, &c. R. R. Co., v. Gildersleeve*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon inter-State commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employé, and the result of the neglect of that ordinary and reasonable care and diligence, in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *Mad River, &c. R. R. Co. v. Barber*, 5 Ohio St. 541. In *Smith v. Railway Co.*, 42 Wis. 520, the brake-staff or rod on a wood train broke just below the cog-wheel near the top of the car, on account of an old crack or seam therein, in consequence of which the brakeman was thrown from the car and injured. The plaintiff had a verdict, but the Supreme Court set it aside upon the ground that there was no evidence to show that the company had been guilty of any negligence in not applying a proper and sufficient test to the brake-rod. And the same rule was applied in *Morrison v. Construction Co.*, 44 Wis. 405, where an injury resulted from the breaking of the wheel of a car.

to the facts of that case, cannot be sustained either upon principle or authority. The plaintiff was injured by a fall occasioned by the

its own locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required. *Smoot v. Mobile, &c. R. R. Co.*, 67 Ala. 13. It is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake which were discoverable upon a reasonable inspection. The inspector represents the company, and is not a fellow-servant of the brakeman. *Long v. Pacific R. R. Co.*, 65 Mo. 225. But in some cases it is held that a notice of the defect to the car-inspector and master-mechanic would only tend to show negligence of duty on their part, and being fellow-servants of the plaintiff, no cause of action could be based on such negligence. *Kidwell v. Houston, &c. R. R. Co.*, 3 Woods (U. S. C. C.), 313; *Smith v. Potter*, 46 Mich. 258. *Engines and other machinery used in operating a railway are liable to become defective and dangerous, and every corporation employing such agencies is charged with notice of this fact, and is bound to exercise a degree of watchfulness commensurate with the nature of its business, and the consequences incident to neglect.* Frequent examinations or other measures of precaution are necessary to prevent engines and machinery from becoming defective and dangerous from natural causes; and consequently as to such agencies the company is bound to active diligence. *Atchison, &c. R. R. Co. v. Holt*, 29 Kan. 149; *Flannagan v. Chicago, &c. R. R. Co.*, 50 Wis. 462; *Smith v. St. Louis, &c. R. R. Co.*, 69 Mo. 32. The rule is that *an employé who knows, or by the exercise of ordinary diligence could know*, of any defects or imperfections in the cars or machinery about which he is employed, and continues in the service without objection, is presumed to have assumed all the consequences from such defects, and to have waived all right to recover for injuries caused thereby. *Muldowney v. Illinois Central R. R. Co.*, 39 Iowa, 615; *Way v. Illinois Central R. R. Co.*, 40 Iowa, 341; *Houston & Texas Cen-*

tral R. R. Co. v. Myers, 55 Tex. 110; *Baker v. Western & Atlantic R. R. Co.*, 68 Ga. 699; *Johnson v. Western & Atlantic R. R. Co.*, 55 Ga. 133; *Le Clair v. St. Paul & Pacific R. R. Co.*, 20 Minn. 1; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Chicago, &c. R. R. Co. v. Munroe*, 85 Ill. 25; *Illinois Central R. R. Co. v. Jones*, 11 Brad. (Ill.) 324. In such cases the real question is whether the servant has had opportunities with his employer for observing the defective machinery or materials, and intends to waive any objection to them. *Dale v. St. Louis, &c. R. R. Co.*, 63 Mo. 455. He is not under the same obligation as the employer to resort to means to discover defects, and has a right to presume that his employer has done his duty and complied with the law; therefore it is only when he has knowledge of defects in machinery, which he continues to use without objection, that he is presumed to have waived the defects. It is his knowledge, and not his means of knowledge, that affects his right to recover. *Muldowney v. Illinois Central R. R. Co.*, 38 Iowa, 462; *Porter v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 160; *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. If he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases. *Crutchfield v. Richmond, &c. R. R. Co.*, 78 N. C. 300. And the fact that an employé knows, or could know, by ordinary care, of defects in the appliances about which he works, which render his employment more than ordinarily hazardous, and still remains in the employment until he is injured, tends to show contributory negligence, but is not conclusive of such negligence. *Perigo v. Chicago, &c. R. R. Co.*, 55 Iowa, 326. He waives all right to recover for injuries caused thereby; and this waiver cannot be affected by the particular situation in which he may be placed, or the rapidity and promptness with which he is required to act at the time of the injury. *Perigo v. Chicago, &c. R. R. Co.*, 52 Iowa, 276. But the fact that the machinery which caused the injury was open to the plaintiff's inspection, and was so worn as to be

breaking of a flagstone in a landing over which the plaintiff was obliged to pass in the performance of his service to the defendant. The defendant himself directed the manner of laying the flag, which the declaration alleged was defective and insufficient. It did not appear, however, that the master *knew* of the defect, and upon this ground the court held that no recovery could be had. The negligence alleged consisted not only in the selection of a stone too thin for the purpose, but also in neglecting to furnish any under support to the stone.¹ Now, it would seem that it was the duty of the master to exercise proper care in the selection of a stone of suitable thickness and strength for the purpose, and also to provide suitable supports therefor, and that the servant had a right to presume that

more than ordinarily dangerous, will not necessarily defeat a recovery where it was a matter of skill and judgment to know how much wear it would stand. *Bridges v. St. Louis, &c. R. R. Co.*, 6 Mo. App. 389. In the absence of proof that the plaintiff was in charge of the car at the time of the injury, except so far as is implied in his service as brakeman, or had any duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it. *Wedge-wood v. Chicago & Northwestern R. R. Co.*, 44 Wis. 44; *Phila., &c. R. R. Co. v. Schertle*, 97 Penn. St. 450; *Baltimore & Ohio R. R. Co. v. State*, 41 Md. 268. A brakeman injured by coupling a damaged car cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read. But a charge of the court assuming as matter of law that the placing of a car on a side track, or marking on it "out of order," was sufficient to charge an ordinary man engaged in coupling it with notice of its damaged condition and the consequent extra risk of coupling it, is erroneous. *Watson v. Houston, &c. R. R. Co.*, 58 Tex. 434. It is for the jury to say whether the insufficiency of employés, the dangerous character of the frog and brake-beam, being known to the injured party, were defects so glaringly dangerous that a man of prudence would not have undertaken the work, or whether he might reasonably suppose himself able to do the work safely by

the exercise of great care and caution. *Stoddard v. St. Louis, &c. R. R. Co.*, 65 Mo. 514. If a person of ordinary prudence would not have believed the defects dangerous, he may disregard them. *Colorado, &c. R. R. Co. v. Ogden*, 3 Col. 499.

¹ *Chicago & Northwestern R. R. Co. v. Schenring*, 4 Brad. (Ill.) 533. It is error to charge that a railroad company is bound to protect its servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result. *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex. 505. It is not negligence in the employer if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or for an external apparent one, produced by time and use, not brought to the master's knowledge. A different rule, however, prevails where the tool or machinery is perishable. *The master is bound to know that such tool or machinery will only last a limited time, and it is his duty to renew instruments of this character at proper intervals.* *Baker v. Allegheny Valley R. R. Co.*, 95 Penn. St. 211; *Painton v. Northern Central R. R. Co.*, 83 N. Y. 7. It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose. *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Smith v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 42 Wis. 520.

the master had discharged his duty in this respect; and that he, the servant, could not be expected to guard against latent defects either in the stone or the manner of its support. It is true, as previously stated, that as to all patent defects, the servant must exercise his own judgment; but this cannot be extended, either in justice or upon principle, to latent or hidden defects. The servant cannot be expected to exercise more skill or judgment than the master, and when the master laid down the stone, or directed it to be laid down, in the manner and situation he did, the servant was justified in believing that the stone was a proper one to be laid there, and that it was laid in a proper manner, and he could not be held chargeable with negligence in trusting himself upon the stone in the manner detailed in the declaration; and, with all due respect to the court it seems to us that the declaration *did* set forth a cause of action, and that the question of negligence on the part of the master should have been submitted to the jury.¹ The error of the court arose from the application of a wrong principle. It proceeded upon the ground that the master was entitled to notice of the defects in the stone; *but this rule only applies where the master, in the first instance, has provided suitable and proper appliances for the business.* That fact appearing in favor of the master, he is then entitled to notice of the defect, unless the circumstances are such that negligence is fairly imputable to him for not knowing it,² and these are all questions of fact for the jury.³

SEC. 371. Remaining in Service after knowledge of Defects, not Negligence per se.—The servant, although he may know that the instrumentalities of the business are not in good repair or condition, is not thereby necessarily chargeable with negligence in remaining in the master's employ and using them, unless real danger therefrom is apparent. In all cases where there is any doubt, the question is for the jury.⁴ And the principal inquiry is, whether the defect was such that, as a prudent man, he was bound not to accept the risks

¹ *Horner v. Nicholson*, 56 Mo. 220. See also *Malone v. Hawley*, 46 Cal. 409, in which the rule was correctly stated thus, where the injury arose from a defective hoisting-tackle. "The master is liable, if the method of attaching the hoisting-rope was unsafe, and the injury resulted from such defect, if the defendant *knew* or *ought to have known* of the defect, and the plaintiff had not equal means of knowledge." *Dolan v. R. R. Co.*, 32 Mich. 510; *McLaren v. Stark*, 10 Ct. of Sess. (Sc.) 31.

² *Noyes v. Smith*, 28 Vt. 59; *Columbus R. R. Co. v. Troesch*, 68 Ill. 545.

³ *Clarke v. Holmes*, 7 H. & N. 348; *Lanning v. R. R. Co.*, 49 N. Y. 251; *Patterson v. R. R. Co.*, 76 Penn. St. 318; *Snow v. R. R. Co.*, 8 Allen (Mass.), 461.

⁴ *Clarke v. Holmes*, 7 H. & N. 349; *Greenleaf v. R. R. Co.*, *ante*; *Patterson v. R. R. Co.*, 76 Penn. St. 318; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441.

incident thereto. Thus, in a Massachusetts case,¹ the plaintiff was employed as a watchman in their machine-shop. A portion of the floor over which he had to pass in the discharge of his duties had for a long time been in a state of decay, and had become unsafe. The plaintiff knew that portions of the floor were decayed, and that there were several holes in it, but the actual condition of the floor, in that respect, was not known to him, nor did it appear that he could have ascertained that the place he broke through was dangerous, unless he examined portions of the floor not open to inspection. The defendants knew, or might have known by reasonable care, the dangerous condition of the floor. The plaintiff, in consequence of the defective condition of the floor, while in the course of his employment broke through the floor and was injured. It was held that the question as to whether the plaintiff was negligent in remaining in the defendant's employ, with the knowledge he had of the condition of the floor, was a proper question for the jury, and was not a question of law for the court.

SEC. 372. Servant must exercise his Judgment. — When a servant is employed upon work, which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. *A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety.* He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant.²

SEC. 373. What Care Company must exercise. — The company is bound to use reasonable care to prevent accidents to its employes, and to this end, is bound to furnish suitable machinery and appliances, and use a like reasonable care in keeping them in proper repair; as the risks assumed by the employes do not extend to those

¹ *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

² *McEwing v. Waterford, &c. Ry. Co.*, 8 Ir. C. L. 389. If the master *ought* to have known that the instrumentalities of the business were defective or unsafe; that is, if by the exercise of ordinary care he would have known it, he is liable

for injuries resulting from such defects. *Williams v. Clough*, 3 H. & N. 258; *Stone v. Mfg. Co.*, 4 Oreg. 52; *Michigan, &c. R. R. Co. v. Dolan*, 33 Mich. 510; *Stark v. Patterson*, 5 Phil. (Penn.) 225; *Owen v. N. Y. Central R. R. Co.*, 1 Lane. (N. Y.) 108.

which are brought about by the negligence of the company.¹ The same rule applies, whether the appliances of the road were manufactured by the company or purchased from a manufacturer.² Where cars come into its trains from other roads, the better doctrine seems to be that the company has a right to assume that they are in proper repair and condition; but as will be seen by the cases cited below, the doctrine is by no means uniform or settled.³ A railway

¹ *Lake Shore, &c. R. R. Co. v. Fitzpatrick*, 31 Ohio St. 474; *Muldowney v. Ill. Central R. R. Co.*, 36 Iowa, 462; *Fifield v. Northern R. R. Co.*, 42 N. H. 225. In *Ellis v. N. Y., Lake Erie, &c. R. R. Co.*, N. Y. Ct. of Appeals, 1884, an action was brought to recover for the death of the plaintiff's intestate, a brakeman employed by the defendant, who, seeing the imminence of a collision between the freight train on which he was employed, and one approaching it from the rear, went out of the front door of the caboose attached to the end of his train and attempted to escape, but was caught between the caboose and the next car and received fatal injuries. It was claimed that the result was due to the fact that the "buffer" on the caboose was so much lower than that of the preceding car that the caboose was driven under the bumper-block of the car ahead, and thus the theory of the action was that the cars and appliances furnished the deceased by the defendant were unsafe and unsuitable, and that this act constituted negligence that would authorize recovery. It was held that it was the duty of the defendant to provide a car properly fitted, not only with running apparatus, — as wheels, stopping-apparatus, as a brake, — but with buffers of some kind, to protect the car and its servants, necessarily or lawfully thereon, from the effect of a collision. *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532; 45 Am. Rep. 268; *Dana v. N. Y. C. R. R. Co.*, 92 N. Y. 639; *Sheehan v. N. Y. Central R. R. Co.*, 91 id. 332; *Durkin v. Sharp*, 88 id. 225; *Booth v. B. & A. R. R. Co.*, 73 id. 38; 29 Am. Rep. 97; *Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607; *Flike v. B. & A. R. R. Co.*, 53 id. 550; 13 Am. Rep. 545.

² *Toledo, &c. R. R. Co. v. Ingraham*, 77 Ill. 309; *Ford v. Fitchburg R. R. Co.*,

110 Mass. 240; *Chicago, &c. R. R. Co. v. Jackson*, 55 Ill. 492; *Hough v. Texas, &c. R. R. Co.*, 100 U. S. 213; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420.

³ *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 250. One railroad company receiving a loaded car from another, and running it upon its own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. See *Wedgewood v. Railroad Co.*, 41 Wis. 478; *Smith v. Railroad Co.*, 42 id. 520; *Morrison v. Railroad Co.*, 44 id. 405; *Steffen v. Railroad Co.*, 46 id. 265; *Railroad Co. v. Hightower*, 92 Ill. 139; *Indianapolis, &c. R. R. Co. v. Toy*, 91 id. 474; *DeGraff v. Railroad Co.*, 76 N. Y. 125; *Warner v. Indianapolis, &c. R. R. Co.*, 39 id. 468; *Baldwin v. Railroad Co.*, 50 Iowa, 680; *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Gildersleeve*, 33 id. 133; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541. But in *O'Neil v. St. Louis, &c. R. R. Co.*, 9 Fed. Rep. 337, a contrary doctrine was held, and where an accident occurred to an employé in consequence of the introduction of a foreign and defectively constructed car into the train on which he was employed, it was held that he might maintain an action of damages against the company therefor. *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212. In a New York case, on a dark night, when snow was on the ground, the plaintiff, a brakeman, was sent to couple together two cars in a freight train which had broken apart. The defendant had three rails laid to enable it to run broad and narrow gauge cars in the same train. Freight cars usually have upon their ends pieces of wood, called bumpers, extending six or eight inches beyond the car, so that if the draw-heads pass each

company is not held to the exercise of extraordinary care, as in the case of passengers, but is only required to furnish such appliances as

other the shock is received by the buffers, and a brakeman, if he be between the cars, will be uninjured. One of the cars which the plaintiff was to couple was a broad-gauge and the other a narrow-gauge car. The buffers only extended three inches beyond the car. These cars did not belong to the defendant. The draw-heads passed each other and the plaintiff was injured. It was held that the question of the defendant's negligence in failing to have proper bumpers upon the cars used by it was properly submitted to the jury, and that a verdict in favor of the plaintiff would not be disturbed. *Gottlieb v. New York, Lake Erie, & Western R. R. Co.*, 29 Hun (N. Y.), 637. In a Minnesota case the defendant received into its service from another railway company a freight-car which proved to be in bad order, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car, was severely injured in consequence of its defective condition, which was not known to him, but was discoverable on proper inspection. It was held, that, as respects such defects, the company was answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. *Fay v. Minneapolis, &c. R. R. Co.*, 30 Min. 231; *St. Louis, &c. R. R. Co. v. Valirius*, 56 Ind. 511. The rule may be said to be that if a railway company permits a defective and dangerous car to come into its yards or upon its tracks, and remain for so many days that it might, by the exercise of proper diligence, discover its condition, and if, from the want of such diligence, an injury happen to an employé, who was exercising due care, the company will be liable, although it does not own the car. *Chicago & Alton R. R. Co. v. Bragonier*, 11 Brad. (Ill.) 516. But a railway company receiving a loaded car from another road and running it upon its own line is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all

parts of the car which appear to be in good condition are so in fact. *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. Nor can it be said to be negligent for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. *Baldwin v. Chicago, &c. R. R. Co.*, 50 Ia. 680. A statutory requirement that every railway shall impartially and diligently receive and forward the cars of other lines does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Smith v. Potter*, 46 Mich. 258. A section-master in temporary charge of a hand-car must note such defects in it as are discernible in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it, if it be obviously unsafe; otherwise he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer as well as to his own credit. *Georgia R. R. & Banking Co. v. Kenney*, 58 Ga. 485; *Kenney v. Central R. R. & Banking Co.*, 61 id. 590; *Central R. R. Co. v. Kenney*, 64 id. 100; *East Tenn., &c. R. R. Co. v. Smith*, 9 Lea (Tenn.), 685. Where an employé was injured by a defect in a hand-car, and the defect was apparent, the employé is presumed to have assumed the risk. But if the danger was greater than could be discovered by the use of ordinary care, then the employer was in default when the injury was produced in a manner not anticipated. *International, &c. R. R.*

of such a period of time that it could be presumed that the servant knew of the changed conditions.

An employé of a railway company who has had any experience in the business is bound to know what risks are usually incident to the service, and the condition of buildings, bridges, etc., upon its line; and if such erections either over or along its line are such that he can discharge his duties safely, by the exercise of ordinary care, he cannot recover for an injury resulting to him therefrom. Thus, if an employé in the performance of his duty is not required to expose his person outside the outer surface of the cars, he cannot recover of the company for an injury sustained by the close proximity of a coal-chute or other erection,¹ by reason of a needless exposure of his person. But where the servant is required to do so, in the line of his duty, as in the case of an engineer or fireman to look out for obstacles upon the track, or of brakemen in giving signals to the engineer, etc., the rule would be otherwise, as the company is required to have its roadway in such a condition *that a servant can perform all the duties required of him with reasonable safety.*² Where a railroad company is in the habit of receiving from other lines cars loaded with timbers, which project over the ends of the cars so as to make it dangerous for any one except a careful and skilful person to attempt to couple the cars, it is not negligence for the company to order and permit such a person, who has been in its employ doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in daylight, although it may be raining at the time.³ In a Michigan case,⁴ an experienced

¹ *Allen v. Burlington, &c. R. R. Co.*, 57 Iowa, 623; *Lovejoy v. Boston, &c. R. R. Co.*, 125 Mass. 79, where the employé was hit and injured by a signal-post. *Dorsey v. Phillips, &c. Construction Co.*, 42 Wis. 583. See also, to the same effect, where the injury resulted from the employé being hit by a water-tank near the track, *Atlanta, &c. R. R. Co. v. Webb*, 61 Ga. 586. See *Atchison, &c. R. R. Co. v. Retford*, 18 Kan. 245, where a baggage-man was injured by a coal-chute, and the fact that, upon complaint being made of its dangerous proximity to the track, the company removed it, was held admissible upon the question of negligence. But *quære*.

² *Chicago, &c. R. R. Co. v. Russell*, 91 Ill. 298. In this case the injury was re-

ceived by a brakeman in the line of his duty, by being hit by a telegraph-pole erected so near the line that in descending from the top of a car he was hit and injured by it. The company was held liable. See also *Hall v. Union Pacific R. R. Co.*, 16 Fed. Rep. 744.

³ *Atchison, Topeka, & Santa Fe R. R. Co. v. Plunkett*, 25 Kan. 188.

⁴ *Day v. Toledo, Canada Southern, & Detroit R. R. Co.*, 42 Mich. 523. See, as to negligent custom in loading timbers, *Hamilton v. Des Moines Valley R. R. Co.*, 36 Ia. 31; as to injuries from collision of the train with cattle, *Wabash, &c. R. R. Co. v. Brown*, 2 Brad. (Ill.) 516, where it was held that the question of liability depended upon the circumstance whether the cattle were on the track by the fault of

SEC. 374. Duty to inspect Appliances. — Of course it is the duty of a railway company to inspect and test its appliances at reasonable periods, and it is bound to know that they will by constant use become defective; but where any of the appliances of the business are apparently safe, and the servants using them make no complaint, and do not call their attention to any defects therein, it cannot be held responsible for an injury resulting from a defect suddenly appearing, unless it has been remiss in testing the appliance; which can only be said to be the case when its attention has been called thereto, or when it has been in use so long, and under such circumstances, that it is

the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that the defect could have been discovered by the exercise of ordinary care, or that such care was not used; and that therefore a refusal to nonsuit was error. In *Warner v. Erie R. R. Co.*, 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. And it may be said that the authorities establish the rule that where the injury is the result of a *latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care*, the master will not be held liable. In *Baldwin v. Chicago, &c. R. R. Co.*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment." In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich. 105. A rail-

road company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. Wayne, &c. R. R. Co., v. Gilderalee*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon inter-State commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employé, and the result of the neglect of that ordinary and reasonable care and diligence, in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *Mad River, &c. R. R. Co. v. Barber*, 5 Ohio St. 541. In *Smith v. Railway Co.*, 42 Wis. 520, the brake-staff or rod on a wood train broke just below the cog-wheel near the top of the car, on account of an old crack or seam therein, in consequence of which the brakeman was thrown from the car and injured. The plaintiff had a verdict, but the Supreme Court set it aside upon the ground that there was no evidence to show that the company had been guilty of any negligence in not applying a proper and sufficient test to the brake-rod. And the same rule was applied in *Morrison v. Construction Co.*, 44 Wis. 405, where an injury resulted from the breaking of the wheel of a car.

which are brought about by the negligence of the company.¹ The same rule applies, whether the appliances of the road were manufactured by the company or purchased from a manufacturer.² Where cars come into its trains from other roads, the better doctrine seems to be that the company has a right to assume that they are in proper repair and condition; but as will be seen by the cases cited below, the doctrine is by no means uniform or settled.³ A railway

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The servant may not know. In this case the deceased did not know; it appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it."

SEC. 375. *Degree of Care required of the Master.*—The proposition may be stated broadly that in no case can the master be held chargeable for an injury resulting to his servant from defects in the machinery or other appliances of the business, unless negligence or fault can be imputed to him.¹ The master's liability is based upon his personal negligence; hence, in all cases the evidence must establish personal fault, or what is equivalent thereto on his part.² He is bound to exercise reasonable care in the choice of the instrumentalities of his business, and the specific degree of care that he must exercise is measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed;³ and therefore the question of negligence on his part is essentially a question for the jury in each case,⁴ and is to be ascertained in view of the circumstances of the case.⁵ A person employing a servant in a powder-mill, where the slightest friction of machinery would probably result in an explosion of the works, and involve serious injury if not instant death to the servant, would be held to a much higher degree of care in the selection of machinery, and watchfulness over it, than one who was engaged in a less hazardous business, and where the consequences of neglect in those respects would be less serious. What would be due care in reference to one class of business might be gross negligence in another. The master is bound to furnish appliances or instrumentalities as safe and free from latent defects as ordinary care and prudence can provide; and this care must be commensurate with the risks to his servants incident to faulty or defective appliances,⁶ and must be continued while the machinery or

¹ *Clarke v. Holmes*, 7 H. & N. 937; *Bartonsbill Coal Co. v. Reid*, 8 Macq. (Sc.). 265.

² *Scott, J.*, in *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Wright v. R. R. Co.*, 25 N. Y. 562; *Keegan v. Western R. R. Co.*, 8 id. 175; *Hayden v. Smithville Co.*, 29 Conn. 548.

³ *Noyes v. Smith*, 28 Vt. 39.

⁴ *Ford v. Fitchburg R. R. Co.*, *ante*; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441.

⁵ *Dixon v. Rankin*, 14 Court of Sessions Cas. (Sc.) 420.

⁶ *Dixon v. Rankin*, *ante*; *Tarrant v. Webb*, 18 C. B. 797; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 238; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Bartons-*

are reasonably calculated to insure the safety of its employé.¹ The servant has a right to assume that the machinery and implements furnished are suitable for the business, and except as to patent and obvious defects he has a right to rely upon it that the company has discharged its duty, and is not himself required to inspect them to ascertain whether they are in fact suitable.² Nor is the company responsible for an injury resulting from defective appliances, unless it has been guilty of negligence in ascertaining the defect. Thus, if the coupling of a freight-car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employé, received in consequence thereof, *unless its attention had been called to the defect, or the company, by the exercise of a reasonable degree of care, could have discovered the defect, and had an opportunity to make the needed repairs.*³

Co. v. Doyle, 49 Tex. 190; Barringer v. Delaware & Hudson Canal Co., 19 Hun (N. Y.), 216. It is gross negligence for a railway company to run its trains on a dark night without a headlight. Burling v. Illinois Central R. R. Co., 85 Ill. 18. In an action by one injured by the giving way of a hoisting-apparatus, used in connection with a train of the company, it appeared that the plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. It was held that the conductor was a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company, and render it responsible. But if he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise. McGowan v. St. Louis, &c. R. R. Co., 61 Mo. 528.

¹ Cooper v. Central R. R. Co. 44 Iowa, 134.

² Porter v. Hannibal, &c., R. R. Co., 71 Mo. 66; Evans v. Lake Shore, &c.

R. R. Co., 12 Hun (N. Y.), 239; King v. Ohio, &c. R. R. Co., 14 Fed. Rep. 277.

³ Indianapolis, Bloomington, & Western R. R. Co. v. Flanigan, 77 Ill. 365. In Steffen v. Railway Co., 46 Wis. 265, the court said: "There may be latent risks in an employment. Where these are known to the master it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In East St. Louis, &c. R. R. Co. v. Hightower, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge or might have had knowledge of the defect by the use of reasonable diligence." Indianapolis, &c. R. R. Co. v. Toy, 91 Ill. 474. In De Graf v. New York Central R. R. Co., 76 N. Y. 125, a brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake-chains to see if they were in their place and apparently sound, but did not test their strength." The court, from all the evidence, held that

gence can be imputed to him in reference to their examination and repair.¹ (Thus, where a railroad company builds its road, lays its rails, erects its bridges, and stocks it with machinery and cars, it is presumed to have done so with due care, and is not liable to a servant for any defects therein, unless negligence can in fact be shown in reference to the particular matter producing the injury.²) Therefore, if a servant is injured by defects in the instrumentalities of the business, he must show *some* fault on the part of the master, as that he did not use ordinary care in providing them originally,³ or that he did not exercise such care in keeping them in repair;⁴ and the fact that the defect might have been ascertained by proper examination and care on the master's part, is sufficient evidence of negligence to charge him with liability;⁵ and he cannot screen himself from liability upon the ground that *he did not know* of the defect, if by ordinary care he would have known of it. *He is bound to know.*⁶

SEC. 377. *Liable for Acts of Agents when.* — It is its duty to use reasonable care in the selection of all the appliances of its business, and as this is a duty which the company owes to the servant, it can-

was unsafe. He is not bound to furnish absolutely safe instrumentalities. If he uses due care in that respect, his duty is discharged." *Riley v. Baxendale*, 6 H. & N. 445. The injury must be attributable to the master's neglect. *Brydon v. Stewart*, 2 Macq. (Sc.), 30; *Williams v. Clough*, 3 H. & N. 259; *Roberts v. Smith*, 2 id. 213; *Marshall v. Stewart*, 33 Eng. Law & Eq. 1; *Paterson v. Wallace*, 1 Macq. 748; *Ormond v. Holland*, 1 Ellis, B. & E. 102.

¹ *Chicago, &c. R. R. Co. v. Sweet*, 45 Ill. 197. See also *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Plank v. R. R. Co.*, 60 N. Y. 607.

² *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Faulkner v. Erie R. R. Co.*, 40 Barb. (N. Y.) —. *Indianapolis R. R. Co. v. Love*, 10 Ind. 553; *Moss v. Johnson*, 22 Ill. 563; *Seaver v. Boston, &c. R. R. Co.*, 14 Gray (Mass.), 466.

³ *Williams v. Clough, ante*; *Patterson v. R. R. Co.*, 76 Penn. St. 389. When an injury results from a defect in machinery, which was constructed for the master, it is not enough to show that the machine was defectively constructed, but it must also appear that the master did not exercise due care in selecting competent persons to

construct it. *Potts v. Port Carlisle, &c. R. R. Co.*, 8 W. R. 524.

⁴ *Johnson v. Bruner*, 61 Penn. St. 58. *McMahon v. Davidson*, 12 Minn. 357; *Columbus, &c. R. R. Co. v. Webb*, 12 Ohio St. 475. "A railroad company," say the court, in *Nashville R. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611, "is bound to see that its road is in good condition and safe, and that the engines are perfect, and properly constructed according to the present improvements in the art; and also to have competent engineers; and if an injury is occasioned to an employé by an imperfection in the road or machinery, the company will be held responsible, provided it had knowledge of such defect, or in the exercise of ordinary care might have known it; and the knowledge of such defect by an engineer employed by the company is knowledge on the part of the company."

⁵ *Dixon v. Rankin*, 14 Court of Sess. (So.) 420; *Williams v. Clough, ante*; *Plank v. R. R. Co.*, 60 N. Y. 607; *Warner v. R. R. Co.*, 39 id. 468.

⁶ *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548; *Hayes v. Smith*, 23 Vt. 59; *Ryan v. Fowler*, 24 N. Y. 410.

bound to know that it must in the ordinary course of things have become unsafe. Thus, in a Pennsylvania case,¹ the plaintiff's intestate was killed by the breaking of a derrick rope which he was using while in the defendant's employ. It appeared that the rope had been in use for three years. The court held that an employer should know that a rope used for three years is no longer safe, and that he is responsible for an injury caused, by the breaking of such a rope, to an employé who did not know the facts. SHARSWOOD, J., said: "The duty which the master owes to his servants is to provide them with safe tools and machinery, when that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use, it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself.² But do these rules apply to such an instrument as a rope used in a derrick which is employed in raising heavy weights? No doubt a perfectly new rope, and one to all appearance sound, may break, and the master would not be responsible for the consequences, having furnished a rope of the proper size for the purpose, to all appearances sound. But there was evidence in this case, sufficient certainly to make a question for the jury, that such a rope, after having been used for a year or more, and exposed during that time as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope, under such circumstances, will only last a limited time. It will not do for him to furnish a sound rope, and then fold his arms until, by actually breaking, it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that, after such a time he ought to provide a new rope. Is the servant bound to notify the master of that which he knows or ought to know without such information? He knows how long the rope has been in use.

¹ *Baker v. Allegheny R. R. Co.*, 95 Penn. St. 211; 40 Am. Rep. 634.

² *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384.

The servant may not know. In this case the deceased did not know; it appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it."

SEC. 375. *Degree of Care required of the Master.*—The proposition may be stated broadly that in no case can the master be held chargeable for an injury resulting to his servant from defects in the machinery or other appliances of the business, unless negligence or fault can be imputed to him.¹ The master's liability is based upon his personal negligence; hence, in all cases the evidence must establish personal fault, or what is equivalent thereto on his part.² He is bound to exercise reasonable care in the choice of the instrumentalities of his business, and the specific degree of care that he must exercise is measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed;³ and therefore the question of negligence on his part is essentially a question for the jury in each case,⁴ and is to be ascertained in view of the circumstances of the case.⁵ A person employing a servant in a powder-mill, where the slightest friction of machinery would probably result in an explosion of the works, and involve serious injury if not instant death to the servant, would be held to a much higher degree of care in the selection of machinery, and watchfulness over it, than one who was engaged in a less hazardous business, and where the consequences of neglect in those respects would be less serious. What would be due care in reference to one class of business might be gross negligence in another. The master is bound to furnish appliances or instrumentalities as safe and free from latent defects as ordinary care and prudence can provide; and this care must be commensurate with the risks to his servants incident to faulty or defective appliances,⁶ and must be continued while the machinery or

¹ *Clarke v. Holmes*, 7 H. & N. 937; *Bartonsbill Coal Co. v. Reid*, 3 Macq. (Sc.). 265.

² *Scott, J.*, in *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Wright v. R. R. Co.*, 25 N. Y. 562; *Keegan v. Western R. R. Co.*, 8 id. 175; *Hayden v. Smithville Co.*, 29 Conn. 548.

³ *Noyes v. Smith*, 28 Vt. 39.

⁴ *Ford v. Fitchburg R. R. Co.*, *ante*; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441.

⁵ *Dixon v. Rankin*, 14 Court of Sessions Cas. (Sc.) 420.

⁶ *Dixon v. Rankin*, *ante*; *Tarrant v. Webb*, 18 C. B. 797; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 238; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Bartons-*

to the facts of that case, cannot be sustained either upon principle or authority. The plaintiff was injured by a fall occasioned by the

its own locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required. *Smoot v. Mobile, &c. R. R. Co.*, 67 Ala. 13. It is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake which were discoverable upon a reasonable inspection. The inspector represents the company, and is not a fellow-servant of the brakeman. *Long v. Pacific R. R. Co.*, 65 Mo. 225. But in some cases it is held that a notice of the defect to the car-inspector and master-mechanic would only tend to show negligence of duty on their part, and being fellow-servants of the plaintiff, no cause of action could be based on such negligence. *Kidwell v. Houston, &c. R. R. Co.*, 3 Woods (U. S. C. C.), 313; *Smith v. Potter*, 46 Mich. 258. *Engines and other machinery used in operating a railway are liable to become defective and dangerous, and every corporation employing such agencies is charged with notice of this fact, and is bound to exercise a degree of watchfulness commensurate with the nature of its business, and the consequences incident to neglect.* Frequent examinations or other measures of precaution are necessary to prevent engines and machinery from becoming defective and dangerous from natural causes; and consequently as to such agencies the company is bound to active diligence. *Atchison, &c. R. R. Co. v. Holt*, 29 Kan. 149; *Flannagan v. Chicago, &c. R. R. Co.*, 50 Wis. 462; *Smith v. St. Louis, &c. R. R. Co.*, 69 Mo. 32. The rule is that *an employé who knows, or by the exercise of ordinary diligence could know*, of any defects or imperfections in the cars or machinery about which he is employed, and continues in the service without objection, is presumed to have assumed all the consequences from such defects, and to have waived all right to recover for injuries caused thereby. *Muldowney v. Illinois Central R. R. Co.*, 39 Iowa, 615; *Way v. Illinois Central R. R. Co.*, 40 Iowa, 341; *Houston & Texas Cen-*

tral R. R. Co. v. Myers, 55 Tex. 110; *Baker v. Western & Atlantic R. R. Co.*, 68 Ga. 699; *Johnson v. Western & Atlantic R. R. Co.*, 55 Ga. 133; *Le Clair v. St. Paul & Pacific R. R. Co.*, 20 Minn. 1; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Chicago, &c. R. R. Co. v. Munroe*, 85 Ill. 25; *Illinois Central R. R. Co. v. Jones*, 11 Brad. (Ill.) 324. In such cases the real question is whether the servant has had opportunities with his employer for observing the defective machinery or materials, and intends to waive any objection to them. *Dale v. St. Louis, &c. R. R. Co.*, 63 Mo. 455. He is not under the same obligation as the employer to resort to means to discover defects, and has a right to presume that his employer has done his duty and complied with the law; therefore it is only when he has knowledge of defects in machinery, which he continues to use without objection, that he is presumed to have waived the defects. It is his *knowledge*, and not his *means of knowledge*, that affects his right to recover. *Muldowney v. Illinois Central R. R. Co.*, 36 Iowa, 462; *Porter v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 160; *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. If he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases. *Crutchfield v. Richmond, &c. R. R. Co.*, 78 N. C. 300. And the fact that an employé knows, or could know, by ordinary care, of defects in the appliances *about which he works*, which render his employment more than ordinarily hazardous, and still remains in the employment until he is injured, tends to show contributory negligence, but is not conclusive of such negligence. *Perigo v. Chicago, &c. R. R. Co.*, 55 Iowa, 326. He waives all right to recover for injuries caused thereby; and this waiver cannot be affected by the particular situation in which he may be placed, or the rapidity and promptness with which he is required to act at the time of the injury. *Perigo v. Chicago, &c. R. R. Co.*, 52 Iowa, 276. But the fact that the machinery which caused the injury was open to the plaintiff's inspection, and was so worn as to be

breaking of a flagstone in a landing over which the plaintiff was obliged to pass in the performance of his service to the defendant. The defendant himself directed the manner of laying the flag, which the declaration alleged was defective and insufficient. It did not appear, however, that the master *knew* of the defect, and upon this ground the court held that no recovery could be had. The negligence alleged consisted not only in the selection of a stone too thin for the purpose, but also in neglecting to furnish any under support to the stone.¹ Now, it would seem that it was the duty of the master to exercise proper care in the selection of a stone of suitable thickness and strength for the purpose, and also to provide suitable supports therefor, and that the servant had a right to presume that

more than ordinarily dangerous, will not necessarily defeat a recovery where it was a matter of skill and judgment to know how much wear it would stand. *Bridges v. St. Louis, &c. R. R. Co.*, 6 Mo. App. 389. In the absence of proof that the plaintiff was in charge of the car at the time of the injury, except so far as is implied in his service as brakeman, or had any duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it. *Wedge-wood v. Chicago & Northwestern R. R. Co.*, 44 Wis. 44; *Phila., &c. R. R. Co. v. Schertle*, 97 Penn. St. 450; *Baltimore & Ohio R. R. Co. v. State*, 41 Md. 268. A brakeman injured by coupling a damaged car cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read. But a charge of the court assuming as matter of law that the placing of a car on a side track, or marking on it "out of order," was sufficient to charge an ordinary man engaged in coupling it with notice of its damaged condition and the consequent extra risk of coupling it, is erroneous. *Watson v. Houston, &c. R. R. Co.*, 58 Tex. 434. It is for the jury to say whether the insufficiency of employés, the dangerous character of the frog and brake-beam, being known to the injured party, were defects so glaringly dangerous that a man of prudence would not have undertaken the work, or whether he might reasonably suppose himself able to do the work safely by

the exercise of great care and caution. *Stoddard v. St. Louis, &c. R. R. Co.*, 65 Mo. 514. If a person of ordinary prudence would not have believed the defects dangerous, he may disregard them. *Colorado, &c. R. R. Co. v. Ogden*, 3 Col. 499.

¹ *Chicago & Northwestern R. R. Co. v. Schenring*, 4 Brad. (Ill.) 533. It is error to charge that a railroad company is bound to protect its servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result. *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex. 505. It is not negligence in the employer if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or for an external apparent one, produced by time and use, not brought to the master's knowledge. A different rule, however, prevails where the tool or machinery is perishable. *The master is bound to know that such tool or machinery will only last a limited time, and it is his duty to renew instruments of this character at proper intervals.* *Baker v. Allegheny Valley R. R. Co.*, 95 Penn. St. 211; *Painton v. Northern Central R. R. Co.*, 83 N. Y. 7. It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose. *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Smith v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 42 Wis. 520.

SEC. 385. **Receiver of Railway liable as Master.** — A receiver operating a railroad is answerable in his official capacity for an injury resulting from his personal negligence, defective machinery, or negligence of co-servants, in all cases where the railroad company itself, if operating the road, would be liable. He acquires no immunity therefrom by reason of his being an officer of the court.¹ But the receiver is not personally liable. He can only be held to the extent of the property in his hands with which to respond to judgments.²

SEC. 386. **What the Servant must establish.** — The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: —

1. That the appliance was defective.
2. That the master had notice thereof, or knowledge, or *ought* to have had.
3. That the servant did not *know* of the defect, and had not equal means of knowing with the master.³

If the injury results from the direct act or neglect of the master, he is liable to his servant, the same as he would be to any person,⁴

¹ *Blumenthal v. Brainerd*, 38 Vt. 402; *Sprague v. Smith*, 29 id. 421; *Meara v. Holbrook et al.*, 20 Ohio St. 137; 5 Am. Rep. 633; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Ohrby v. Ryde Comm'rs*, 5 B. & S. 743; *Whitehouse v. Fellows*, 10 C. B. (N. S.) 785; *Ruck v. Williams*, 3 H. & N. 308; *Paige v. Smith*, 99 Mass. 395.

² *Mersey Docks Co. v. Gibbs*, *ante*; *Ruck v. Williams*, *ante*; *Meara v. Holbrook et al.*, *ante*. A receiver is not personally liable for the torts of his employes; it is only when he commits the wrong himself that he is personally liable. Were he so liable few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceeding against him as receiver for the wrongs of his employes is in the nature of a proceeding *in rem*, and renders the property in his hands as such liable for compensation for such injuries. *Meara v. Holbrook*, 20 Ohio St. 137; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jordan v. Wells*, 3 Woods (U. S. C. C.), 527; *Kennedy v. Indianapolis & C. R. R. Co.*, 11 Cent. Law J. 89. The railroad company is not liable for the injuries complained of in the

bill for the reason that they were committed while it was out of possession of the property and had no control over it. This conclusion is sustained by principle and authority. *Ohio, &c. R. R. Co. v. Davis*, 23 Ind. 560; *Bell v. Indianapolis, &c. R. R. Co.*, 53 id. 57; *Metz v. Buffalo, &c. R. R. Co.*, 58 N. Y. 61; *Rogers v. Mobile & O. R. R. Co.*, 17 Cent. L. J. 290; *Meara v. Holbrook*, *ante*; *Davis v. Duncan*, 19 Fed. Rep. —.

³ *Malone v. Hawley*, 46 Cal. 409; *Baxter v. Roberts*, 44 id. 187; 13 Am. Rep. 160; *Sizer v. Syracuse R. R. Co.*, 7 Lana. (N. Y.) 67; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Haskin v. R. R. Co.*, 65 Barb. (N. Y.) 129; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151. In *Davies v. England*, 10 Jurist (N. S.), 1235, the plaintiff was employed to cut up the carcasses of cattle. He did not know, but the defendants did, that he would expose himself to danger on account of the diseased meat, and he was injured from that cause. It was held that the defendants were bound to warn him of the danger, and having failed to do so, were liable for the consequences.

⁴ *Perry v. Ricketts*, 55 Ill. 234; *Horner v. Nicholson*, 56 Mo. 220; *Sizer v. R. R.*

incident thereto. Thus, in a Massachusetts case,¹ the plaintiff was employed as a watchman in their machine-shop. A portion of the floor over which he had to pass in the discharge of his duties had for a long time been in a state of decay, and had become unsafe. The plaintiff knew that portions of the floor were decayed, and that there were several holes in it, but the actual condition of the floor, in that respect, was not known to him, nor did it appear that he could have ascertained that the place he broke through was dangerous, unless he examined portions of the floor not open to inspection. The defendants knew, or might have known by reasonable care, the dangerous condition of the floor. The plaintiff, in consequence of the defective condition of the floor, while in the course of his employment broke through the floor and was injured. It was held that the question as to whether the plaintiff was negligent in remaining in the defendant's employ, with the knowledge he had of the condition of the floor, was a proper question for the jury, and was not a question of law for the court.

SEC. 372. Servant must exercise his Judgment. — When a servant is employed upon work, which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. *A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety.* He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant.²

SEC. 373. What Care Company must exercise. — The company is bound to use reasonable care to prevent accidents to its employes, and to this end, is bound to furnish suitable machinery and appliances, and use a like reasonable care in keeping them in proper repair; as the risks assumed by the employes do not extend to those

¹ *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

² *McEwing v. Waterford, &c. Ry. Co.*, 8 Ir. C. L. 389. If the master *ought* to have known that the instrumentalities of the business were defective or unsafe; that is, if by the exercise of ordinary care he would have known it, he is liable

for injuries resulting from such defects. *Williams v. Clough*, 3 H. & N. 258; *Stone v. Mfg. Co.*, 4 Oreg. 52; *Michigan, &c. R. R. Co. v. Dolan*, 83 Mich. 510; *Stark v. Patterson*, 5 Phil. (Penn.) 225; *Owen v. N. Y. Central R. R. Co.*, 1 Lam. (N. Y.) 108.

which are brought about by the negligence of the company.¹ The same rule applies, whether the appliances of the road were manufactured by the company or purchased from a manufacturer.² Where cars come into its trains from other roads, the better doctrine seems to be that the company has a right to assume that they are in proper repair and condition; but as will be seen by the cases cited below, the doctrine is by no means uniform or settled.³ A railway

¹ *Lake Shore, &c. R. R. Co. v. Fitzpatrick*, 31 Ohio St. 474; *Muldowney v. Ill. Central R. R. Co.*, 36 Iowa, 462; *Fifield v. Northern R. R. Co.*, 42 N. H. 225. In *Ellis v. N. Y., Lake Erie, &c. R. R. Co.*, N. Y. Ct. of Appeals, 1884, an action was brought to recover for the death of the plaintiff's intestate, a brakeman employed by the defendant, who, seeing the imminence of a collision between the freight train on which he was employed, and one approaching it from the rear, went out of the front door of the caboose attached to the end of his train and attempted to escape, but was caught between the caboose and the next car and received fatal injuries. It was claimed that the result was due to the fact that the "buffer" on the caboose was so much lower than that of the preceding car that the caboose was driven under the bumper-block of the car ahead, and thus the theory of the action was that the cars and appliances furnished the deceased by the defendant were unsafe and unsuitable, and that this act constituted negligence that would authorize recovery. It was held that it was the duty of the defendant to provide a car properly fitted, not only with running apparatus, — as wheels, stopping-apparatus, as a brake, — but with buffers of some kind, to protect the car and its servants, necessarily or lawfully thereon, from the effect of a collision. *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532; 45 Am. Rep. 268; *Dana v. N. Y. C. R. R. Co.*, 92 N. Y. 639; *Sheehan v. N. Y. Central R. R. Co.*, 91 id. 332; *Durkin v. Sharp*, 88 id. 225; *Booth v. B. & A. R. R. Co.*, 73 id. 38; 29 Am. Rep. 97; *Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607; *Flike v. B. & A. R. R. Co.*, 53 id. 550; 13 Am. Rep. 545.

² *Toledo, &c. R. R. Co. v. Ingraham*, 77 Ill. 309; *Ford v. Fitchburg R. R. Co.*,

110 Mass. 240; *Chicago, &c. R. R. Co. v. Jackson*, 55 Ill. 492; *Hough v. Texas, &c. R. R. Co.*, 100 U. S. 213; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420.

³ *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 250. One railroad company receiving a loaded car from another, and running it upon its own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. See *Wedgewood v. Railroad Co.*, 41 Wis. 478; *Smith v. Railroad Co.*, 42 id. 520; *Morrison v. Railroad Co.*, 44 id. 405; *Steffen v. Railroad Co.*, 46 id. 265; *Railroad Co. v. Hightower*, 92 Ill. 139; *Indianapolis, &c. R. R. Co. v. Toy*, 91 id. 474; *DeGraff v. Railroad Co.*, 76 N. Y. 125; *Warner v. Indianapolis, &c. R. R. Co.*, 39 id. 468; *Baldwin v. Railroad Co.*, 50 Iowa, 680; *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Gildersleeve*, 33 id. 133; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541. But in *O'Neil v. St. Louis, &c. R. R. Co.*, 9 Fed. Rep. 337, a contrary doctrine was held, and where an accident occurred to an employé in consequence of the introduction of a foreign and defectively constructed car into the train on which he was employed, it was held that he might maintain an action of damages against the company therefor. *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212. In a New York case, on a dark night, when snow was on the ground, the plaintiff, a brakeman, was sent to couple together two cars in a freight train which had broken apart. The defendant had three rails laid to enable it to run broad and narrow gauge cars in the same train. Freight cars usually have upon their ends pieces of wood, called bumpers, extending six or eight inches beyond the car, so that if the draw-heads pass each

company is not held to the exercise of extraordinary care, as in the case of passengers, but is only required to furnish such appliances as

other the shock is received by the buffers, and a brakeman, if he be between the cars, will be uninjured. One of the cars which the plaintiff was to couple was a broad-gauge and the other a narrow-gauge car. The buffers only extended three inches beyond the car. These cars did not belong to the defendant. The draw-heads passed each other and the plaintiff was injured. It was held that the question of the defendant's negligence in failing to have proper bumpers upon the cars used by it was properly submitted to the jury, and that a verdict in favor of the plaintiff would not be disturbed. *Gottlieb v. New York, Lake Erie, & Western R. R. Co.*, 29 Hun (N. Y.), 637. In a Minnesota case the defendant received into its service from another railway company a freight-car which proved to be in bad order, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car, was severely injured in consequence of its defective condition, which was not known to him, but was discoverable on proper inspection. It was held, that, as respects such defects, the company was answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. *Fay v. Minneapolis, &c. R. R. Co.*, 30 Min. 231; *St. Louis, &c. R. R. Co. v. Valirius*, 56 Ind. 511. The rule may be said to be that if a railway company permits a defective and dangerous car to come into its yards or upon its tracks, and remain for so many days that it might, by the exercise of proper diligence, discover its condition, and if, from the want of such diligence, an injury happen to an employé, who was exercising due care, the company will be liable, although it does not own the car. *Chicago & Alton R. R. Co. v. Bragonier*, 11 Brad. (Ill.) 516. But a railway company receiving a loaded car from another road and running it upon its own line is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all

parts of the car which appear to be in good condition are so in fact. *Ballou v. Chicago, &c. R. R. Co.*, 54 Wis. 257. Nor can it be said to be negligent for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. *Baldwin v. Chicago, &c. R. R. Co.*, 50 Ia. 680. A statutory requirement that every railway shall impartially and diligently receive and forward the cars of other lines does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Smith v. Potter*, 46 Mich. 258. A section-master in temporary charge of a hand-car must note such defects in it as are discernible in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it, if it be obviously unsafe; otherwise he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer as well as to his own credit. *Georgia R. R. & Banking Co. v. Kenney*, 58 Ga. 485; *Kenney v. Central R. R. & Banking Co.*, 61 id. 590; *Central R. R. Co. v. Kenney*, 64 id. 100; *East Tenn., &c. R. R. Co. v. Smith*, 9 Lea (Tenn.), 685. Where an employé was injured by a defect in a hand-car, and the defect was apparent, the employé is presumed to have assumed the risk. But if the danger was greater than could be discovered by the use of ordinary care, then the employer was in default when the injury was produced in a manner not anticipated. *International, &c. R. R.*

are reasonably calculated to insure the safety of its employé.¹ The servant has a right to assume that the machinery and implements furnished are suitable for the business, and except as to patent and obvious defects he has a right to rely upon it that the company has discharged its duty, and is not himself required to inspect them to ascertain whether they are in fact suitable.² Nor is the company responsible for an injury resulting from defective appliances, unless it has been guilty of negligence in ascertaining the defect. Thus, if the coupling of a freight-car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employé, received in consequence thereof, *unless its attention had been called to the defect, or the company, by the exercise of a reasonable degree of care, could have discovered the defect, and had an opportunity to make the needed repairs.*³

Co. v. Doyle, 49 Tex. 190; Barringer v. Delaware & Hudson Canal Co., 19 Hun (N. Y.), 216. It is gross negligence for a railway company to run its trains on a dark night without a headlight. Burling v. Illinois Central R. R. Co., 85 Ill. 18. In an action by one injured by the giving way of a hoisting-apparatus, used in connection with a train of the company, it appeared that the plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. It was held that the conductor was a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company, and render it responsible. But if he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise. McGowan v. St. Louis, &c. R. R. Co., 61 Mo. 528.

¹ Cooper v. Central R. R. Co. 44 Iowa, 134.

² Porter v. Hannibal, &c., R. R. Co., 71 Mo. 66; Evans v. Lake Shore, &c.

R. R. Co., 12 Hun (N. Y.), 289; King v. Ohio, &c. R. R. Co., 14 Fed. Rep. 277.

³ Indianapolis, Bloomington, & Western R. R. Co. v. Flanigan, 77 Ill. 365. In Steffen v. Railway Co., 46 Wis. 265, the court said: "There may be latent risks in an employment. Where these are known to the master it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In East St. Louis, &c. R. R. Co. v. Hightower, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge or might have had knowledge of the defect by the use of reasonable diligence." Indianapolis, &c. R. R. Co. v. Toy, 91 Ill. 474. In De Graf v. New York Central R. R. Co., 76 N. Y. 125, a brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake-chains to see if they were in their place and apparently sound, but did not test their strength." The court, from all the evidence, held that

SEC. 374. Duty to inspect Appliances. — Of course it is the duty of a railway company to inspect and test its appliances at reasonable periods, and it is bound to know that they will by constant use become defective; but where any of the appliances of the business are apparently safe, and the servants using them make no complaint, and do not call their attention to any defects therein, it cannot be held responsible for an injury resulting from a defect suddenly appearing, unless it has been remiss in testing the appliance; which can only be said to be the case when its attention has been called thereto, or when it has been in use so long, and under such circumstances, that it is

the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that the defect could have been discovered by the exercise of ordinary care, or that such care was not used; and that therefore a refusal to nonsuit was error. In *Warner v. Erie R. R. Co.*, 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. And it may be said that the authorities establish the rule that where the injury is the result of a *latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care*, the master will not be held liable. In *Baldwin v. Chicago, &c. R. R. Co.*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment." In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich. 105. A rail-

road company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. Wayne, &c. R. R. Co., v. Gildersleeve*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon inter-State commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employé, and the result of the neglect of that ordinary and reasonable care and diligence, in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *Mad River, &c. R. R. Co. v. Barber*, 5 Ohio St. 541. In *Smith v. Railway Co.*, 42 Wis. 520, the brake-staff or rod on a wood train broke just below the cog-wheel near the top of the car, on account of an old crack or seam therein, in consequence of which the brakeman was thrown from the car and injured. The plaintiff had a verdict, but the Supreme Court set it aside upon the ground that there was no evidence to show that the company had been guilty of any negligence in not applying a proper and sufficient test to the brake-rod. And the same rule was applied in *Morrison v. Construction Co.*, 44 Wis. 405, where an injury resulted from the breaking of the wheel of a car.

bound to know that it must in the ordinary course of things have become unsafe. Thus, in a Pennsylvania case,¹ the plaintiff's intestate was killed by the breaking of a derrick rope which he was using while in the defendant's employ. It appeared that the rope had been in use for three years. The court held that an employer should know that a rope used for three years is no longer safe, and that he is responsible for an injury caused, by the breaking of such a rope, to an employé who did not know the facts. SHARSWOOD, J., said: "The duty which the master owes to his servants is to provide them with safe tools and machinery, when that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use, it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself."² But do these rules apply to such an instrument as a rope used in a derrick which is employed in raising heavy weights? No doubt a perfectly new rope, and one to all appearance sound, may break, and the master would not be responsible for the consequences, having furnished a rope of the proper size for the purpose, to all appearances sound. But there was evidence in this case, sufficient certainly to make a question for the jury, that such a rope, after having been used for a year or more, and exposed during that time as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope, under such circumstances, will only last a limited time. It will not do for him to furnish a sound rope, and then fold his arms until, by actually breaking, it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that, after such a time he ought to provide a new rope. Is the servant bound to notify the master of that which he knows or ought to know without such information? He knows how long the rope has been in use.

¹ *Baker v. Allegheny R. R. Co.*, 95 Penn. St. 211; 40 Am. Rep. 634.

² *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384.

The servant may not know. In this case the deceased did not know; it appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it."

SEC. 375. *Degree of Care required of the Master.* — The proposition may be stated broadly that in no case can the master be held chargeable for an injury resulting to his servant from defects in the machinery or other appliances of the business, unless negligence or fault can be imputed to him.¹ The master's liability is based upon his personal negligence; hence, in all cases the evidence must establish personal fault, or what is equivalent thereto on his part.² He is bound to exercise reasonable care in the choice of the instrumentalities of his business, and the specific degree of care that he must exercise is measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed;³ and therefore the question of negligence on his part is essentially a question for the jury in each case,⁴ and is to be ascertained in view of the circumstances of the case.⁵ A person employing a servant in a powder-mill, where the slightest friction of machinery would probably result in an explosion of the works, and involve serious injury if not instant death to the servant, would be held to a much higher degree of care in the selection of machinery, and watchfulness over it, than one who was engaged in a less hazardous business, and where the consequences of neglect in those respects would be less serious. What would be due care in reference to one class of business might be gross negligence in another. The master is bound to furnish appliances or instrumentalities as safe and free from latent defects as ordinary care and prudence can provide; and this care must be commensurate with the risks to his servants incident to faulty or defective appliances,⁶ and must be continued while the machinery or

¹ *Clarke v. Holmes*, 7 H. & N. 937; *Bartonahill Coal Co. v. Reid*, 3 Macq. (Sc.). 265.

² *Scott, J.*, in *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Wright v. R. R. Co.*, 25 N. Y. 562; *Keegan v. Western R. R. Co.*, 8 id. 175; *Hayden v. Smithville Co.*, 29 Conn. 548.

³ *Noyes v. Smith*, 28 Vt. 39.

⁴ *Ford v. Fitchburg R. R. Co.*, *ante*; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441.

⁵ *Dixon v. Rankin*, 14 Court of Sessions Cas. (Sc.) 420.

⁶ *Dixon v. Rankin*, *ante*; *Tarrant v. Webb*, 18 C. B. 797; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 238; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Bartons-*

appliances are in use, to see that they are kept in repair and in a safe condition. "It is the duty," say the court in a Maine case,¹ "of every employer to use reasonable precaution for the safety of those in his employment, by providing them with suitable machinery, and keeping it in a condition not to endanger the safety of the employed; and by the same reasoning, bridges, passage-ways or ladders necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer."²

SEC. 376. **Master is presumed to have discharged his Duty.**—The measure of the master's duty is to exercise due care in providing instrumentalities for the servant in the prosecution of the business, and *prima facie* he is presumed to have done so;³ and if he has in fact done so, no liability attaches for defects therein, either in machinery,⁴ materials,⁵ buildings,⁶ or other appliances,⁷ unless negli-

hill Coal Co. v. Reid, 3 Macq. (Sc.), 272; Keegan v. Railroad Co., 8 N. Y. 175; Clarke v. Holmes, 7 H. & N. 937; 6 id. 349; Wigmore v. Jay, 5 Exch. 354; Buzzell v. Laconia, &c. Co., 48 Me. 113; Snow v. Housatonic R. R. Co., 8 Allen (Mass.), 441; Hayden v. Smithville Co., 29 Conn. 548.

¹ Buzzell v. Laconia Mfg. Co., 48 Me. 113.

² In Fifield v. Northern R. R. Co., 42 N. H. 225, the defendant provided a safe road-bed, but during the winter season permitted it to become blocked with snow and ice, and did not use due care to remove it. The plaintiff having been injured in consequence of such obstruction, the company was held chargeable with negligence, and liable therefor. Knowledge of an engineer of defects in an engine is held knowledge of the master. Nashville, &c. R. R. Co. v. Elliott, 1 Cold. (Tenn.) 612. So knowledge of a foreman whose duty it is to repair, is knowledge of the master. Brabbitt v. Chicago, &c. R. R. Co., 37 Wis. 290. See also Baldwin v. Cassella, L. R. 7 Exch. 325. In Snow v. Housatonic R. R. Co., 8 Allen (Mass.),

440, the plaintiff was injured while uncoupling cars, by reason of defects in the road-bed. It was held that, as these defects were the result of original construction, the defendants were chargeable with negligence, and consequently with liability. Ryan v. Fowler, 24 N. Y. 410; Seaver v. Boston & Maine R. R. Co., 14 Gray (Mass.), 466; Cayzer v. Taylor, 10 id. 274; Keegan v. Western R. R. Co., 8 N. Y. 175; King v. Boston & Worcester R. R. Co., 9 Cush. (Mass.) 112; Park v. O'Brien, 23 Conn. 339; Norris v. Litchfield, 35 N. H. 271; Wright v. N. Y. C. R. R. Co., 25 N. Y. 562; Brydon v. Stewart, 2 Macq. (Sc.), 30.

³ Hard v. R. R. Co., 32 Vt. 473. "The legal implication is," say the court in Gibson v. R. R. Co., 46 Mo. 163, 2 Am. Rep. 497, "that the employer will adopt suitable instruments and means with which to carry on his business; and where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew or might have known by the exercise of reasonable care, that the apparatus

⁴ Hard v. R. R. Co. *ante*; Noyes v. Smith, 28 Vt. 59.

⁵ Tarrant v. Webb, 8 C. B. 797; Railroad Co. v. Webb, 12 Ohio St. 475; Wigmore v. Jay, 5 Exch. 354.

⁶ Malone v. Hathaway, *ante*.

⁷ Warner v. Erie R. Co., 39 N. Y. 468; Wilson v. Merry, L. R. 1 S. & D. 326.

gence can be imputed to him in reference to their examination and repair.¹ (Thus, where a railroad company builds its road, lays its rails, erects its bridges, and stocks it with machinery and cars, it is presumed to have done so with due care, and is not liable to a servant for any defects therein, unless negligence can in fact be shown in reference to the particular matter producing the injury.²) Therefore, if a servant is injured by defects in the instrumentalities of the business, he must show *some* fault on the part of the master, as that he did not use ordinary care in providing them originally,³ or that he did not exercise such care in keeping them in repair;⁴ and the fact that the defect might have been ascertained by proper examination and care on the master's part, is sufficient evidence of negligence to charge him with liability;⁵ and he cannot screen himself from liability upon the ground that *he did not know* of the defect, if by ordinary care he would have known of it. *He is bound to know.*⁶

SEC. 377. *Liable for Acts of Agents when.* — It is its duty to use reasonable care in the selection of all the appliances of its business, and as this is a duty which the company owes to the servant, it can-

was unsafe. He is not bound to furnish absolutely safe instrumentalities. If he uses due care in that respect, his duty is discharged." *Riley v. Baxendale*, 6 H. & N. 445. The injury must be attributable to the master's neglect. *Brydon v. Stewart*, 2 Macq. (Sc.), 30; *Williams v. Clough*, 3 H. & N. 259; *Roberts v. Smith*, 2 id. 213; *Marshall v. Stewart*, 33 Eng. Law & Eq. 1; *Paterson v. Wallace*, 1 Macq. 748; *Ormond v. Holland*, 1 Ellis, B. & E. 102.

¹ *Chicago, &c. R. R. Co. v. Sweet*, 45 Ill. 197. See also *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Plank v. R. R. Co.*, 60 N. Y. 607.

² *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Faulkner v. Erie R. R. Co.*, 40 Barb. (N. Y.) —. *Indianapolis R. R. Co. v. Love*, 10 Ind. 553; *Moss v. Johnson*, 22 Ill. 563; *Seaver v. Boston, &c. R. R. Co.*, 14 Gray (Mass.), 466.

³ *Williams v. Clough*, *ante*; *Patterson v. R. R. Co.*, 76 Penn. St. 389. When an injury results from a defect in machinery, which was constructed for the master, it is not enough to show that the machine was defectively constructed, but it must also appear that the master did not exercise due care in selecting competent persons to

construct it. *Potts v. Port Carlisle, &c. R. R. Co.*, 8 W. R. 524.

⁴ *Johnson v. Bruner*, 61 Penn. St. 58. *McMahon v. Davidson*, 12 Minn. 357; *Columbus, &c. R. R. Co. v. Webb*, 12 Ohio St. 475. "A railroad company," say the court, in *Nashville R. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611, "is bound to see that its road is in good condition and safe, and that the engines are perfect, and properly constructed according to the present improvements in the art; and also to have competent engineers; and if an injury is occasioned to an employé by an imperfection in the road or machinery, the company will be held responsible, provided it had knowledge of such defect, or in the exercise of ordinary care might have known it; and the knowledge of such defect by an engineer employed by the company is knowledge on the part of the company."

⁵ *Dixon v. Rankin*, 14 Court of Sess. (Sc.) 420; *Williams v. Clough*, *ante*; *Plank v. R. R. Co.*, 60 N. Y. 607; *Warner v. R. R. Co.*, 39 id. 458.

⁶ *Hayden v. Smithfield Mfg. Co.*, 20 Conn. 548; *Hayes v. Smith*, 28 Vt. 59; *Ryan v. Fowler*, 24 N. Y. 410.

not relieve itself from responsibility by showing that it had delegated the duty to a competent agent. The duty is positive and must be fulfilled strictly,¹ the rule being that, where a master owes certain duties to his servant, he is liable for the manner in which

¹ *Chicago, &c. R. R. Co. v. Taylor*, 69 Ill. 461; *Chicago, &c. R. R. Co. v. George*, 19 Ill. 510; *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Besel v. N. Y. Central R. R. Co.*, 70 N. Y. 171; *Huntington, &c. R. & Coal Co. v. Decker*, 82 Penn. St. 119; *Brickner v. N. Y. Central R. R. Co.*, 2 Lans. (N. Y.) 506; *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 521; *Booth v. Boston, &c. R. R. Co.*, 73 N. Y. 38; *Harvey v. N. Y. Central R. R. Co.*, 19 Hun (N. Y.), 556; *Flike v. Boston, &c. R. R. Co.*, 53 N. Y. 564; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262. In *Mitchell v. Robinson*, 80 Ind. 281, it appeared that the appellant, who resided in Kentucky, had formed a partnership for the purpose of buying and slaughtering hogs in New Albany, Indiana, on the premises where the appellee was hurt, one of the appellants being the owner of the premises. At the time of the accident, they were engaged in preparations for commencing the business. The defendants were not personally present, and had no notice of the defective condition of the boiler. They had employed one Jones as a general superintendent of their proposed business, and in that capacity he was present, superintending the said preparations, and had engaged the appellee to come and go to work as a common laborer on the day when he was injured. He came accordingly, in the morning, and was preparing to go to work, but Jones had not yet arrived, when the explosion took place. Some days before, Jones had been notified by one who had been employed to clean the boiler and had been in it for that purpose, that the boiler was unsafe; that there was a crack in the head of it more than a foot long. In support of their claim that Jones and the appellee were fellow-servants, and that the appellee could have no recourse upon the master for an injury caused by the negligence of Jones to notify the master of the defective

condition of the boiler, the following cases were cited: *Columbus, &c. R. R. Co. v. Arnold*, 31 Ind. 174; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Roberts v. Smith*, 2 H. & N. 213; *Wigmore v. Jay*, 5 Exch. 354; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; *Ormond v. Holland, Ell., B., & E.* 102. The case, however, was held not to come within the principle contended for, as applicable to fellow-servants engaged in the same employment, but rather within the rule that *a general agent employed to represent the master in his absence, and charged with the duties which it would be incumbent on the master to perform if he were present, is not a mere fellow-servant, whose negligence can impose no liability upon the master to an injured subordinate.* The owner of mills or machinery, which men are employed to operate, owes duties to the employes which he cannot escape by absenting himself and committing the entire charge to an agent. *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369, where it is shown that the individual who does act by an agent, as well as a corporation which can act in no other way, is responsible for the neglect of the general agent so employed. To the same effect are *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Cumberland, &c. R. R. Co. v. State*, 44 Md. 283; *Cumberland, &c. R. R. Co. v. State*, 45 id. 229; *Brabbitts v. Chicago, &c. R. R. Co.*, 38 Wis. 289. This is in harmony with the cases in which it is held that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation. *Pittsburgh, &c. R. R. Co. v. Ruby*, 38 Ind. 294; *Ohio, &c. R. R. Co. v. Collarn*, 73 id. 261; 38 Am. Rep. 134; *Malone v. Hathaway*, 64 N. Y. 5; 21 Am. Rep. 573; *Murphy v. Smith*, 19 C. B. (N. S.) 361.

that duty is discharged, through whatever agency he acts.¹ Therefore if a railway company delegates to an employé the duty of inspecting the machinery and appliances of the road, *while engaged in the discharge of that duty he is acting not only for, but as the company; and his negligence in that respect is the negligence of the company.*² It is said in some of the text-books,³ and in some of the cases,⁴ that in all cases where the master has committed the entire control or management of his business to another, reserving no discretion, or control to himself, the person to whom such power is delegated stands in the place and stead of the master, so that his acts are, in law, the acts of the master.⁵ But this rule is difficult of application, and by no means embodies the doctrine advanced by the cases. The instances are rare in which the master, either by himself or some superior servant, does not reserve *some* supervision over every department of his business, or at least reserve such a right in himself; and if the rule was to be confined to such narrow limits as a strict application of the letter and spirit of the rule as stated indicates, very few cases would come within its operation; and the rule as now held by the better class of cases may be said to be that *whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent; and to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other*

¹ *Wager v. Railroad Co.*, 55 Penn. St. 473; *Hurd v. Rutland, &c. R. R. Co.*, 32 Vt. 473; *Ford v. Fitchburg R. R. Co.*, *ante*; *Beaulieu v. Portland, &c. R. R. Co.*, 48 Me. 295; *O'Conner v. Roberts*, 120 Mass. 227.

² *Brown v. Chicago, &c. R. R. Co.*, 53 Iowa, 595; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 N. Y. 5; *Booth v. Boston, &c. R. R. Co.*, 73 N. Y. 38; *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 522; *Brickner v. N. Y. Central R. R. Co.*, 2 Lans. (N. Y.) 506; *Kirkpatrick v. N. Y. Central R. R. Co.*, 79 N. Y. 240. In *Stevenson v. Jewett*, 16 Hun (N. Y.), 210, the plaintiff's intestate was a fireman in the defendant's employ, and was killed by the explosion of a boiler of a locomotive. The boiler was

shown to be defective and out of repair. It was also shown that it had been at the repair-shop six months before the explosion, and that the defects in it could have been ascertained upon examination. It was held that the superintendent having charge of the repairs stood in the place of the company, and that any fault on his part was the fault of the company. The plaintiff was nonsuited in the lower court, but the nonsuit was set aside.

³ Wharton on Negligence, § 229.

⁴ *Malone v. Hathaway, ante*; *Mullan v. Steamship Co.*, 78 Penn. St. 26.

⁵ *Corcoran v. Holbrook*, 59 N. Y. 517; *Brickner v. R. R. Co.*, 2 Lans. (N. Y.) 506; affirmed, 49 N. Y. 672; *Malone v. Hathaway, ante*; *Mullan v. Steamship Co., ante*.

rant to each person who engages in the service the competency of every servant employed, and cannot be made responsible, unless it is shown that he was guilty of a want of care in the selection of the person through whose negligence the injury occurred;¹ but he does impliedly undertake that he will exercise reasonable care in this respect, and that he will continue to exercise such care, even after their employment, by discharging those who prove incompetent, so that his servants shall not be exposed to more than the ordinary hazards incident to the service.

SEC. 391. *Degree of Care required of the Master.*—The degree of care to be exercised by a master in the selection of servants, materials, or machinery, is such as is reasonable and proper, in view of the nature and character of the business, and the consequences likely to result from a negligent or unskilful execution of the work, or from defective or improper appliances. Thus, a higher degree of care would be required in the employment of a servant to run a locomotive upon a railway than in the employment of a brakeman, or in the employment of a switch-tender than in the employment of an ordinary track-hand; for the consequences of the employment of an unskilful or careless person in one place would result in more serious consequences than in the other. And so, generally, the degree of care to be observed in the employment of laborers must be commensurate with the nature and the dangers of the business, and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless and incompetent person, and such care as a reasonably prudent man would exercise in the same business or undertaking. If a railroad company should employ a person as engineer who was a stranger to them, and about whose experience or skill they knew nothing, either by their own observation or information from others, and he should prove incompetent *in fact*, this would doubtless be regarded as such negligence on their part as would render them liable for all injuries resulting to other of their servants therefrom; and the same is applicable to every species of skilled or hazardous service. In every case the question of reasonable care, or want of care, is a question of fact for the jury; and the circumstances attending the hiring are necessarily material, and if claimed to be

¹ *Treadwell v. Mayor, etc. of N. Y.*, 1 *Mad River R. R. Co.*, 8 *Ohio St.* 249; *Daly*, 123; *Coon v. Syracuse, &c. R. R.* *Wright v. N. Y. Central R. R. Co.*, 25 *Co.*, 5 *N. Y.* 492; *Sherman v. Rochester, N. Y.* 562. *&c. R. R. Co.*, 17 *id.* 153; *Whealan v.*

upon insufficient circumspection or care, the plaintiff should show the fact by proof.¹

SEC. 392. *Law presumes the Master has performed his Duty.*—*Prima facie*, where the law imposes a duty upon another, it presumes that such duty was properly performed; hence, from the mere circumstance that the servant is in fact incompetent, and that injury has resulted to other servants therefrom, the law will not presume want of care on the part of the master, although such facts are material circumstances, in connection with other facts, to establish want of care; and the burden in all such cases is upon the servant seeking a recovery, to establish the fact *that the injury resulted to him because the master did not exercise reasonable and proper care in these respects*; and this must be established as a *fact* in the case, and cannot result as an inference from the circumstance that the servant causing the injury was in fact incompetent, or that the materials or resources of the business were in fact defective.²

Neither incompetency nor unskilfulness of a co-servant will be presumed; in order to make either available as a ground of action it must be proved; and merely showing the manner in which he did the particular act complained of is not generally of itself sufficient to warrant such an inference.³ For an injury resulting *entirely* from the negligence of a co-servant, no fault being imputable to the master in his employment or retention, no liability exists on his part.⁴ Liability attaches only when the master is at fault,⁵ and in

¹ *Lalor v. Chicago, &c. R. R. Co.*, 52 Ill. 401; *R. R. Co. v. Troesch*, 68 id. 545; *Connolly v. Poillon*, 41 Barb. (N. Y.) 366; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Wonder v. Balt., &c. R. R. Co.*, 32 Md. 411; *O'Donnell v. Allegheny, &c. R. R. Co.*, 59 Penn. St. 239; *Moran v. N. Y. C. & H. R. R. Co.*, 3 T. & C. (N. Y.) 770; *Cooper v. R. R. Co.*, 23 Wis. 668; *Noyes v. Smith*, 28 Vt. 29; *Hutchinson v. R. R. Co.*, 5 Exch. 352; *Gilman v. Eastern R. R. Co.*, 10 Allen, 238; *Tarrant v. Webb*, 18 C. B. 797; *Bartonshill Coal Co. v. Reid*, 3 Macq. 272; *Ormond v. Holland, El., Bl., & El.* 102; *Weems v. Mathieson*, 4 Macq. (Sc.) 215; *Clarke v. Holmes*, 7 H. & N. 937; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; *Cayser v. Taylor*, 10 Gray (Mass.), 274; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Fox v. Sandford*, 4 Sneed (Tenn.), 36; *Anderson v. New Jersey R. R. Co.*, 7 Robt. (N. Y.) 611; *McMahon v. Davidson*, 12 Minn. 357; *Frazier v. Penn. R. R. Co.*, 38 Penn. St. 104; *Michigan R. R. Co. v. Leakey*, 10 Mich. 193; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *McDermott v. Pacific R. R. Co.*, 30 id. 115; *Warner v. Erie R. R. Co.*, 39 N. Y. 471; *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99.

² *Baulec v. R. R. Co.*, 59 N. Y. 356; *Moss v. R. R. Co.*, 49 Mo. 167; *Davis v. R. R. Co.*, 20 Mich. 105; *Tarrant v. Webb*, 18 C. B. 797.

³ *Summersell v. Fish*, 117 Mass. 312.

⁴ *Fitzpatrick v. S. & N., &c. R. R. Co.*,

⁵ *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 238; *Farwell v. Boston, &c. R. R. Co.*, 4 Met. (Mass.) 43; *Bartonshill Coal Co. v. Reid*, 3 Macq. (Sc.) 263.

all cases the burden is upon the servant to show want of care on the part of the master in selecting or retaining the negligent or unskilful servant, as well also as negligence or unskilfulness in the servant;¹ and if it appears that the servant had, or ought to have had, the same knowledge of the servant's incompetency that the master had, he cannot recover. He is not bound to inquire, to ascertain his co-servant's habits or qualities as a servant, but he is bound to see what transpires in his presence; but he is not in all cases presumed to know as well as the master the *general* reputation of a co-servant for care or skill.² The master being liable for negligence in selecting or retaining a negligent or unskilful servant, the declaration should not only set forth an injury resulting from the negligence or unskilfulness of the servant, *but should also allege negligence on the part of the master, either in employing or retaining him*; and a declaration merely alleging an injury received from the carelessness of a co-servant does not set forth a cause of action.³

SEC. 393. **Negligence in Hiring or Retaining must be proved.** — The servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation or unfitness on the master's part is not shown. Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be *habitual*, rather than occasional, or of such a character as renders it imprudent in the master to retain him in his employ, and such that a prudent man, knowing the facts, would not

7 Ind. 436; *Leahey v. Michigan Central R. R. Co.*, 10 Mich. 199; 1 Redfield on Railways, 520; *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 426; *Priestley v. Fowler*, 3 M. & W. 1; *Abraham v. Reynolds*, 5 H. & N. 142; *Hutchinson v. R. R. Co.*, *post*; *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 154; *Searle v. Lindsay*, 11 C. B. n. s. 429; *O'Connell v. Balt. &c. R. R. Co.*, 20 Md. 212; *Hard v. Vt. & Canada R. R. Co.*, 32 Vt. 478; *Weger v. Penn. Central R. R. Co.*, 55 Penn. St. 460; *Harrison v. R. R. Co.*, 31 N. J. 293; *Feltham v. England*, L. R. 2 Q. B. 33; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 239; *Warner v. Erie R. R. Co.*, 39 N. Y. 470; *Thayer v. St. Louis, &c. R. R. Co.*, 22 Ind. 26; *Caldwell v. Brown*, 53 Penn. St. 457; *Beaulieu v. Portland Co.*, 48 Me. 294;

Carle v. B. & P. R. R. Co., 43 id. 269; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 270; *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 564.

¹ *Mad R. R. Co. v. Barber*, 50 Ohio St. 568; *Indianapolis R. R. Co. v. Love*, 10 Ind. 554; *Faulkner v. Erie R. R. Co.*, 49 Barb. (N. Y.) 324; *McMillan v. Saratoga, &c. R. R. Co.*, 20 id. 442; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557; *Knuz v. Stuart*, 1 Daly (N. Y. C. P.), 432; *Thayer v. R. R. Co.*, *ante*.

² *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233; *Frazer v. Penn. R. R. Co.*, 38 Penn. St. 104; *Laning v. R. R. Co.*, 49 N. Y. 521.

³ *Moss v. Pacific R. R. Co.*, 49 Mo. 167; 8 Am. Rep. 126.

have retained the servant in his employ.¹ A single act of negligence on the part of a servant may or may not be sufficient to make it obligatory upon the master to discharge him, — according to the character of the act or omission, the nature of the service in which he is employed, and the consequences of negligence to other employés.²

SEC. 394. **When Master is affected with Notice of Incompetency.** — When a servant is generally known to be incompetent, *the master is chargeable with negligence for not knowing what his reputation is*; ³ and if he employs a servant generally reputed to be careless and incompetent, he is chargeable with negligence in his employment, even though he was himself, in fact, ignorant of such unfitness.⁴ But the reputation of the servant in that respect must be so general that it could readily have been ascertained upon inquiry, in which case the negligence consists in not making proper inquiry.⁵ The master is only required to use reasonable diligence in the selection of competent servants, and when he has done that his duty to the servants is performed; ⁶ but he must perform this duty reasonably and with reasonable reference to the nature of the employment, and the dangers incident to the employment of unskilful or incompetent persons. What is reasonable care in that respect is therefore necessarily a question for the jury.⁷

¹ *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Farwell v. Boston R. R. Co.*, 4 Met. (Mass.) 47; *Sullivan v. R. R. Co.*, 11 Iowa, 421; *Beaulieu v. Portland Co.*, 48 Me. 291; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Hubgh v. N. O. Co.*, 6 La. An. 496; *R. R. Co. v. Troesch*, 68 Ill. 545; *Wonder v. Baltimore, &c., R. R. Co.*, 32 Md. 411; *Harper v. Indianapolis R. R. Co.*, 47 Mo. 567; *Davis v. Detroit, &c. R. R. Co.*, 20 Mich. 105; *McDermott v. R. R. Co.*, 30 Mo. 115; *Hunt v. Chicago, &c. R. R. Co.*, 26 Iowa, 363; *Columbus R. R. Co. v. Webb*, 12 Ohio St. 475; *Michigan, &c. R. R. Co. v. Leahy*, 10 Mich. 199; *Ponton v. Wilmington R. R. Co.*, 6 Jones (N. C.), 245; *Illinois R. R. Co. v. Cox*, 21 Ill. 20; *Cooper v. Mullins*, 30 Ga. 146; *Conlin v. Charleston*, 15 Rich. (S. C.) 201; *Donaldson v. R. R. Co.*, 18 Iowa, 280; *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Chapman v. Erie R. R. Co.*, 55 id.; *Noyes v. Smith*, 28 Vt. 59; *Hard v. R. R. Co.*, 32 id.

² *Baulec v. N. Y. & Harlem R. R. Co.*, 59 N. Y. 356; *Davis v. Detroit R. R. Co.*, 20 Mich. 105; *Chapman v. Erie R. R. Co.*, 55 N. Y. 579; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Kroy v. Chicago, &c. R. R. Co.*, 32 Iowa, 357.

³ *Davis v. Detroit R. R. Co.*, 20 Mich. 105.

⁴ *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233.

⁵ *Cooley, J.*, in *Davis v. R. R. Co.*, 20 Mich. 105; *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 566. In *Noyes v. Smith*, 28 Vt. 63, the court say: "The master is bound to exercise diligence and care that he brings into his service only such as are safe, capable, and trustworthy; and for any neglect in exercising diligence he is liable to the servant for injuries sustained from that neglect." *Gibson v. R. R. Co.*, 46 Mo. 163; *Harper v. Indianapolis R. R. Co.*, 47 id. 567; *Hutchinson v. R. R. Co.*, 5 Exch. 352.

⁶ *Fox v. Sandford*, 4 Sneed (Tenn.), 36;

⁷ *Davis v. Detroit R. R. Co.*, *ante*; *Gilman v. R. R. Co.*, *ante*; *Gibbs v. Crombie*, 3 Ct. of Sess. (Sc.) (3d Series), 886. See statement of case, *ante*.

SEC. 395. Rule when Servant knows of Co-servant's Incompetency. — Where a co-servant is injured through the incompetency of a fellow-servant, and he *knows or has the same means of knowing* of such incompetency as the master has, he cannot recover for injuries resulting to him from such servant's negligent acts, because he is chargeable with negligence in not informing the master, if he knew the fact, or if he did not, is equally as chargeable with negligence as the master for not knowing it;¹ and if he did know of it, and with such knowledge remained in the service, he is treated as assuming all the risks incident to such incompetency or unskilfulness,² unless he establishes a reasonable excuse for remaining.³ The master is bound to inquire as to the servant's qualification for the service,⁴ and to do all that a prudent man would do under similar circumstances, in view of the nature of the service and the consequences of its careless or improper execution. He cannot screen himself from liability upon the ground that he was deceived by the statements of the servant himself as to his experience or habits, if upon reasonable inquiry he would have ascertained his incompetency or unfitness.⁵ The duty imposed upon the master in this respect is substantial and absolute. *He must at his peril exercise reasonable care in the selection of the appliances of his business and of co-servants*, and whether he has done so or not is essentially a question for the jury;⁶ and the rule is the same whether he discharges this duty himself or delegates it to others.⁷

SEC. 396. Incompetency of the Servant, and Negligence of the Master must be Shown. — Where a servant is injured or killed while in the employ of his master, by an accident resulting from the habitual negligence of a fellow-servant, known to and acquiesced in by the master, the master is not liable to an action by the servant or his representatives, if the servant has, by his own negligence at the

¹ Davis v. R. R. Co., *ante*; Lalor v. Chicago, &c. R. R. Co., 52 Ill. 401; Chicago, &c. R. R. Co. v. Murphy, 53 id. 336.

² Mad R. R. Co. v. Barber, 5 Ohio St. 563; Hayden v. Mfg. Co., 29 Conn. 559; Skipp v. Eastern Counties Ry. Co., 9 Exch. 223; Wright v. R. R. Co., 25 N. Y. 566; Frazier v. R. R. Co., 38 Penn. St. 104; Seymour v. Maddox, 16 Q. B. 324.

³ Laning v. R. R. Co., 49 N. Y.; Clarke v. Holmes, 7 H. & N. 937.

⁴ Noyes v. Smith, 28 Vt. 59; Harper v. R. R. Co., 47 Mo. —

⁵ Gilman v. R. R. Co., 10 Allen (Mass.), 233; Wright v. R. R. Co., 28 Barb. (N. Y.)

30. The judgment in this case was reversed upon appeal (25 N. Y. 562), but by later decisions in the Court of Appeals its doctrine has been affirmed, while that announced in the appellate court has been overruled. Laning v. R. R. Co., *ante*; Flike v. R. R. Co., *ante*; Chapman v. R. R. Co., *ante*; Alabama, &c. R. R. Co. v. Waller, 48 Ala. 457; N. O. R. R. Co. v. Hughes, 49 Miss. 258.

⁶ Gilman v. R. R. Co., *ante*.

⁷ Wright v. R. R. Co., 28 Barb. (N. Y.) 30; Laning v. R. R. Co., *ante*; Walker v. Bolling, 22 Ala. 294; Grizzle v. Frost, 3 F. & F. 622.

time, *in knowing and disregarding the danger*, contributed to the accident. But if there is no contributory negligence by the servant, the master is liable.¹ The rule applies only where the injury happened without any actual fault of the principal or master, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it happens.²

SEC. 397. Difference in Grade or Class of Service does not affect the matter.—The fact that the servants were engaged in separate and distinct branches of service does not render the master liable; *all* who are engaged in the same common service, from the highest to the lowest, and who are subject to the same *general control*, are fellow-servants within the rule.³ But in some of the States it is held that servants are not to be treated as fellow-servants unless they are subject to the same *immediate control*, and engaged in the same department of labor.⁴ Where two servants of a common master are employed upon the same work, and one of them, without authority from his employer, directs the other to use a machine for a

¹ *Senior v. Ward*, 1 El. & El. 385; *Brother v. Cartter*, 52 Mo. 372; *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578; *Honner v. Ill. Central R. R. Co.*, 15 Ill. 550; *Ill. Central R. R. Co. v. Cox*, 21 id. 24; *Chicago, &c. R. R. Co. v. Keefe*, 47 id. 108; *Same v. Murphy*, 53 id. 336; *C. B. & Q. R. R. Co. v. Gregory*, 58 id. 272; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Noyes v. Smith*, 28 Vt. 56; *Lalor v. Chicago, &c. R. R. Co.*, 52 Ill. 401; 4 Am. Rep. 616; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 238; *Hard v. Vt. & Canada R. R. Co.*, 32 Vt. 473; *Beaulieu v. Portland Co.*, 48 Me. 295; *Feltham v. England, L. R. 2 Q. B. 33*; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Harper v. Indianapolis, &c. R. R. Co.*, 47 id. 567; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228; *Brydon v. Stewart*, 2 Macq. (Sc.) 30; *Patterson v. Wallace*, 1 id. 757; *Brothers v. Cartter*, 52 Mo. 373; 14 Am. Rep. 424; *Haskin v. R. R. Co.*, 65 Barb. (N. Y.) 129.

² *McMillan v. Saratoga, &c. R. R. Co.*, 20 Barb. (N. Y.) 449; *Keegan v. Western R. R. Co.*, 8 N. Y. 175.

³ *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 83; *Yeomans v. Contra Costa*

Steam Nav. Co., 44 Cal. 71; *Fitzpatrick v. R. R. Co.*, 7 Ind. 436; *Columbus, &c. R. R. Co. v. Arnold*, 31 Ind. 174; *Russell v. R. R. Co.*, 5 Duer (N. Y.), 39; *Washburn v. R. R. Co.*, 3 Head (Tenn.), 638; *Manville v. Cleveland, &c. R. R. Co.*, 11 Ohio St. 417; *Gillshannon v. Stony Brook R. R. Co.* 10 Cush. (Mass.) 228; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384; *Russell v. Hudson R. R. Co.*, 17 N. Y. 134; reversing s. c., 5 Duer (N. Y.), 39; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233; *Seaver v. Boston, &c. R. R. Co.*, 14 Gray (Mass.), 466; *contra*, see *Fitzpatrick v. New Albany R. R. Co.*, 7 Ind. 436. The conductor, brakemen, engineer, and station-agents are regarded as co-servants. *Wilson v. Madison, &c. R. R. Co.*, 18 Md. 226; *Packet Co. v. McCue*, 17 Wall. (U. S.) 508; *Baird v. Pettitt*, 70 Penn. St. 477.

⁴ *R. R. Co. v. Fort*, 17 Wall. (U. S.) 559; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; *Morgan v. Vale of Neath Railway Co.*, L. R. 1 Q. B. 149; *Feltham v. England L. R. 2 Q. B. 33*; *Columbus, &c. R. R. Co. v. Arnold*, 31 Ind. 174; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Wonder v. R. R. Co.*, *ante*; *Malone v. Hathaway, ante*; *Laning v. R. R. Co.*, *ante*; *Chapman v. R. R. Co.*, *ante*.

dangerous and improper purpose, for which it was not intended or provided, and he complies and thereby receives an injury, the employer will not be held liable;¹ but if such person had authority to direct such servant, the rule is otherwise.²

SEC. 398. **When Machinery is Defective, but Promoting Cause of Injury is Negligence of Co-servant.** — Where the injury arises from the negligence of a co-servant, no recovery can be had even though it results from the use by them of machinery which, unless used in a particular manner, is unsafe, nor even though appliances might be provided that would be safe without such careful use by the servant.³

¹ *R. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Ryan v. Chicago, &c. R. R. Co.*, 60 Ill. 171; *Nashville, &c. R. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

² *Chicago, &c. R. R. Co. v. Harney*, 28 Ind. 28; *Ford v. R. R. Co.*, 110 Mass. 240; *Siegel v. Schantz*, *ante*; *Fort v. R. R. Co.*, *ante*; *Grizzle v. Frost*, 3 F. & F. 322; *Murphy v. Smith*, *ante*; *Flike v. Boston, &c. R. R. Co.*, *ante*; *Laning v. R. R. Co.*, *ante*.

³ *Allen v. The New Gas Co.*, L. R. 1 Ex. Div. 251; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Lovegrove v. Ry. Co.*, 16 C. B. (N. s.) 692; *Cotton v. Wood*, 8 C. B. (N. s.) 568; *Feltham v. England*, L. R. 2 Q. B. 33. In *Howell v. The Landore Siemens Steel Co.*, L. R. 10 Q. B. 62, the plaintiff brought an action for

injuries resulting in the death of John Howell, a servant of the defendants, by the explosion of firedamp. Howell was at work in the defendant's mine, under the control of one Thomas, as manager. The explosion occurred, as the jury found, by the failure of Thomas to withdraw the men after noxious gas had been found to prevail in the mine. It was held that Thomas was a co-servant with Howell, and that the defendants consequently were not liable. *Memphis, &c. R. R. Co. v. Thomas*, 51 Miss. 637; *N. O., &c. R. R. Co. v. Hughes*, 49 id. 258; *Gilman v. R. R. Co.*, 10 Allen (Mass.), 233; *Farwell v. Boston, &c. R. R. Co.*, 4 Met. (Mass.) 49; *King v. Boston, &c. R. R. Co.*, 9 Cush. (Mass.) 112; *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 270.

CHAPTER XXV.

BAGGAGE.

SEC. 399. Liable for, as Common Carriers.	SEC. 405. Passenger must call for Baggage within a reasonable Time.
400. Right to Limit Amount.	406. Limitations upon Liability of Carrier for Baggage.
401. What is Personal Baggage.	407. When Baggage is received by Carrier through mistake.
402. When Liability for, Ceases.	408. Merchandise, etc.
403. Baggage-checks, effect of.	
404. Rule when Passenger retains Possession of his Baggage, when it is treated as in possession of the Carrier.	

SEC. 399. *Liable for, as Common Carriers.* — Common carriers not being insurers of the safety of their passengers, it was formerly held that they could not be treated as common carriers of a passenger's baggage, unless a distinct price was paid therefor.¹ But the modern rule holds them chargeable as common carriers of such luggage, whether a distinct price is paid therefor or not.² The carrier, however, is only liable for such luggage as is given into his custody and possession by the passenger,³ and having the custody and posses-

¹ *Meddleton v. Fowler*, 1 Salk. 282; *Wolf v. Summers*, 2 Camp. 631; *Upshare v. Adee*, 1 Comyn, 25.

² *Woods v. Davin*, 13 Ill. 746; *Bomor v. Maxwell*, 9 Humph. (Tenn.) 621; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 75; *Prixatti v. McLaughlin*, 1 Strob. (S. C.) 468; *Williams v. Great Western Ry. Co.*, 10 Exch. 15; *Marshall v. York, Newcastle, & Berwick Ry. Co.*, 11 C. B. 655; *Richards v. London & South Coast Ry. Co.*, 7 C. B. 839; *Butcher v. London & South-Western Ry. Co.*, 16 C. B. 18. In this case there was evidence of negligence upon the part of the company's servants. *Midland Ry. Co. v. Bromley*, 17 C. B. 372; *Cockburn, C. J.*, in *Le Conteur v. London & South-Western Ry. Co.*, 1 L. R. Q. B. 54, 59; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Walsh v. The H. M. Wright*, 1 Newb.

494; *Holdridge v. Utica, &c. R. R. Co.*, 56 Barb. (N. Y.) 191; *Gore v. Norwich, &c. R. R. Co.*, 2 Daly (N. Y. C. P.), 254; *Camden, &c. R. R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 386.

³ *Tower v. Utica R. R. Co.*, 7 Hill (N. Y.), 47; *Kinsley v. Lake Shore, &c. R. R. Co.*, 125 Mass. 54. But in England it has been held that the carrier is in point of law in the custody of a passenger's baggage, although it has not been delivered to any servant of the company, so as to render it liable for its loss. *Le Conteur v. So.-Western Ry. Co.*, L. R. 1 Q. B. 54; *Gt. Northern Ry. Co. v. Shepherd*, 8 Exch. 30; *Robinson v. Dunmore*, 2 B. & P. 416.

sion of the baggage, there is no injustice in holding him responsible therefor.

SEC. 400. **Right to Limit Amount.** — Of course, a carrier of passengers is only required to carry a reasonable amount of baggage, and may by by-law or otherwise restrict the amount to be carried for any one passenger, and may also refuse to carry anything as baggage except the passenger's ordinary personal luggage.¹ Thus, a railway company may refuse to carry merchandise as personal luggage,² or anything except what is necessary or useful for the passenger's personal comfort and convenience.³

SEC. 401. **What is Personal Baggage.** — It is not always easy to determine what is a passenger's ordinary personal luggage, for which the carrier is liable, but the general drift of the authorities seems to be that it comprises only such articles as a traveller usually carries with him for his comfort and convenience, both during the journey⁴ and during his stay at the place of his destination.⁵ This embraces all kinds of clothing for himself and family who travel with him, as well as articles of jewelry and personal adornment.⁶ The question as to what constitutes articles of personal convenience has been variously decided, and depends largely upon the habits, manners, and customs of the people in the section of country in which the question arises, as well as the profession, or rank and condition of the passenger, and the length of the journey, and the purposes for which it was undertaken. A person undertaking a *long* journey requires many more articles for his personal convenience than one undertaking a short one; and while a person undertaking a journey of only a few miles is entitled to put in his baggage a sum of money sufficient to defray the reasonable expenses of his journey, yet he would

¹ *Mytton v. Midland Ry. Co.*, 28 L. J. Exchq. 385; *Phelps v. London, &c. Ry. Co.*, 19 C. B. N. S. 321.

² *Collins v. Boston, &c. R. R. Co.*, 10 Cush. (Mass.) 606; *The Ionic*, 6 Blatchf. (U. S. C. C.) 538; *Dibble v. Brown*, 12 Ga. 83; *Bell v. Drew*, 4 E. D. S. (N. Y. C. P.) 59; *Stinson v. Conn. River R. R. Co.*, 44 N. H. 325; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Doyle v. Kyser*, 6 Ind. 242.

³ *Merrill v. Grinnell*, 30 N. Y. 594; *Stinson v. Conn. River, &c. R. R. Co.*, 98 Mass. 83; *Smith v. Boston, &c. R. R. Co.*, 44 N. H. 325.

⁴ *Merrill v. Grinnell*, 30 N. Y. 594; *Johnson v. Stone*, 11 Humph. (Tenn.) 419; *Whitmore v. Steamer Caroline*, 20 Mo. 513; *Dibble v. Brown*, 12 Ga. 217; *Shepherd v. Gt. Northern Ry. Co.*, 8 Exchq. 30; *Brook v. Pickwick*, 4 Bing. 218.

⁵ *Toledo, &c. R. R. Co. v. Hammond*, 33 Ind. 379; *New Orleans, &c. R. R. Co. v. Moore*, 40 Miss. 39.

⁶ *McCormick v. Hudson River R. R. Co.*, 4 E. D. S. (N. Y. C. P.) 181; *Smith v. Boston, &c. R. R. Co.*, 44 N. H. 325; *Mississippi, &c. R. R. Co. v. Kennedy*, 41 Miss. 671.

not be entitled to place there, at the risk of the carrier, so large a sum as a person undertaking a long journey, as in all cases the question of *reasonableness* in this respect is to be determined in view of the circumstances. This rule is well illustrated by a recent case decided in the United States Supreme Court.¹ In that case a Russian lady travelling in this country carried as a part of her baggage and for her personal use a large quantity of lace, used as a part of her wearing-apparel on certain occasions, and which she valued at seventy-five thousand dollars, and which the jury found to be worth ten thousand. The trunk containing it was lost, and the court held that under the circumstances a recovery could be had therefor. "Manuscript books," the property of a student, and used in the prosecution of his studies, have been held to be ordinary baggage; also a gun and fishing-tackle;² so the instruments of an army surgeon travelling with troops;³ an opera-glass;⁴ a carpenter's tools;⁵ a pocket-pistol and a pair of duelling-pistols;⁶ linen, cut into shirt-bosoms for the use of the passenger;⁷ a watch;⁸ personal jewelry;⁹ a rifle, a revolver, two gold chains, two gold rings, and a silver pencil-case;¹⁰ a proper sum of money for travelling expenses;¹¹ but not an amount beyond that which a prudent person would deem proper for the purpose;¹² nor money belonging to another passenger, however reasonable in amount.¹³ Money, in order to constitute baggage, must be confined to such a reasonable sum as is necessary to defray the expenses of the journey; consequently, money placed in a trunk for the purpose of buying clothing at the place to which the passenger is going, has been held not to be recoverable as baggage.¹⁴ Thus, in the case last cited, the plaintiff admitted that sixty dollars of the

¹ New York Central, &c. R. R. Co. v. Torpey v. Williams, 3 Daly (N. Y.), 162.

² Hopkins v. Westcott, 6 Hill (N. Y.), 589.

³ Hannibal R. R. Co. v. Swift, 12 Wall. (U. S.) 262.

⁴ Toledo, &c. R. R. Co. v. Hammond, 33 Ind. 379.

⁵ Porter v. Hildebrand, 14 Penn. St. 129.

⁶ Woods v. Denin, 13 Ill. 746. But see Chicago, &c. R. R. Co. v. Collins, 56 Ill. 212, where it was held that only one pistol could be recovered for as baggage.

⁷ Duffy v. Thompson, 4 E. D. S. (N. Y. C. P.) 178; McCormick v. Hudson River R. R. Co., 4 E. D. S. (N. Y. C. P.) 181;

⁸ Jones v. Voorhees, 10 Ohio, 145.

⁹ Doyle v. Kyser, 6 Ind. 242; McCormick v. Hudson River R. R. Co., ante; Torpey v. Williams, 3 Daly (N. Y. C. P.), 162.

¹⁰ Braty v. Grand Trunk Ry. Co., 32 U. C. Q. B. 66.

¹¹ Merrill v. Grinnell, 30 N. Y. 594.

¹² Jordan v. Fall River R. R. Co., 5 Cuah. (Mass.) 69; Dunlap v. International Steamboat Co., 98 Mass. 371.

¹³ Stewart v. International Steamboat Co., 98 Mass. 371.

¹⁴ Hickox v. Naugatuck, &c. R. R. Co., 31 Conn. 281.

money lost from his trunk was taken with him for the purpose of buying clothing, and the court held that it was not recoverable. The amount of money which may be treated as baggage is to be measured by the object, length, and purpose of the journey, and is such a reasonable sum as a prudent person would deem necessary in view of all the circumstances, and is a question of fact to be found by the jury.¹

When an extra charge is made for baggage, even though it consists of articles not within the class of ordinary baggage, it is held, in the absence of any fraud or imposition on the part of the passenger, that the carrier is liable for its loss by fraud or negligence; and this was held to be the case where a passenger packed "specie" in his trunk, and procured it to be taken as baggage, although the company advertised that "passengers are prohibited from taking with them anything as baggage but their wearing-apparel, which will be at the risk of the owner."² Among articles of necessity, for which a carrier by water is liable as baggage, is such bedding as is carried by a steerage passenger for use on the voyage;³ but not bedding packed in a trunk, or not used on the voyage.⁴ Whether bedding belonging to a person who is moving with his family, packed in a box or trunk, is baggage or not, is a question of fact for the jury, in view of all the circumstances, and the use, quality, value, and kind of articles.⁵ The rules adopted by the courts as to what constitutes ordinary baggage are not always consistent nor uniform; and the doctrine of some of the cases, carried out to their legitimate sequence, would almost admit of a passenger taking along with him his entire household furniture, if he is a *poor man*, and needs the furniture for use at the end of his journey, and it can be packed in trunks or boxes.⁶

¹ Illinois Central R. R. Co. v. Copeland, 24 Ill. 332; Jordan v. Fall River R. R. Co., 5 Cush. (Mass.) 69. In Fairfax v. New York Central, &c. R. R. Co., 73 N. Y. 167, thirty English sovereigns in a trunk were recovered for, the jury having found that the sum was reasonable for expenses under the circumstances.

² Camden, &c. R. R. Co. v. Baldauf, 16 Penn. St. 67.

³ Hirschshon v. American Packet Co., 2 J. & S. (N. Y. Superior Ct.) 521.

⁴ Connolly v. Warren, 106 Mass. 146.

⁵ Onimit v. Henshaw, 35 Vt. 605.

⁶ Of this class are Onimit v. Henshaw, 35 Vt. 604; and Parmelee v. Fischer, 22 Ill. 212. In the former of these cases it was held that a feather-bed and the necessary accompaniments of bedquilts, pillows, etc., belonging to a *poor man* removing with his family, might properly be regarded as personal baggage; while in the latter case "two feather-beds and pillows, two coverlets, two bed-spreads, or blankets, . . . one oil-cloth table-cover, . . . one German-silver or britannia teapot, one looking-glass, one new double-barrelled gun, one set of common dishes, two dozen

From what has been said, and the cases given, it will be seen that the question as to what constitutes "ordinary baggage," within the legal significance of the term, depends entirely upon the circumstance whether the articles are "necessary or convenient" to the traveller under the circumstances of the case, or are such as are usually carried by travellers. As we have seen, jewelry for personal use, to a reasonable extent, is within the term; but jewelry intended for presents to a traveller's friends is not.¹ But it seems that articles purchased for his family are properly baggage, if such as are usually carried, although not necessary for his use or comfort on the journey.² Masquerade costumes furnished for use at a ball,³ and masonic regalia, engravings, valuable merchandise, etc., do not come under the head of baggage,⁴ nor indeed any articles which are not necessary or convenient for the use of the passenger on his journey; and in all cases the question as to what is reasonable, necessary, or convenient is a question of fact for the jury, in view of the character of the journey and the special circumstances of the case.⁵ The rule is, that when a traveller presents to a carrier of passengers, as his baggage, a trunk or carpet-bag, without describing its contents, he impliedly represents that it only contains such articles as are usually carried as baggage, or such as are necessary for his convenience and comfort upon his journey. The carrier is not bound to inquire for articles of extraordinary value which it may contain; but if there are such, the passenger should disclose the fact, that the carrier may exercise the increased vigilance which such extraordinary value demands.⁶

German-silver spoons, one serving-box, . . . and six towels," together with considerable clothing, worth about one hundred and fifty dollars, were found by the jury to be such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement or protection, having regard to the object and length of the journey. The verdict was upheld on appeal. These cases cannot be said to conform to the principles usually adopted in this class of cases, except they are put upon the ground that travellers of the class in question, in the section of country where the action was brought, usually carried such articles as baggage, and the carrier was bound to know of the usage, and

therefore to assent to accept and take them as baggage.

¹ *Nevins v. Bay State, &c. Co.*, 4 Bosw. (N. Y.) 225.

² *Dexter v. Syracuse, &c. R. R. Co.*, 34 N. Y. 326.

³ *Michigan, &c. R. R. Co. v. Oehm*, 56 Ill. 293.

⁴ *Nevins v. Bay State, &c. Co.*, *ante*; *Pardee v. Drew*, 25 Wend. (N. Y.) 459.

⁵ *Merrill v. Grinnell*, 30 N. Y. 594.

⁶ *Michigan, &c. R. R. Co. v. Carrow*, 73 Ill. 348. In this case the trunk contained \$30,000 in jewelry, and was checked as ordinary baggage. It was destroyed by fire. The company was held not liable for its loss.

SEC. 402. **When Liability for, Ceases.** — The liability of a common carrier for the baggage of a passenger continues until the baggage is ready to be delivered to the owner at his destination, and until he has had a reasonable opportunity of receiving and removing it. What constitutes such reasonable time and opportunity is a mixed question of law and fact, necessarily dependent upon the peculiar surroundings of each particular case.¹ And where, for his own convenience, a passenger left his baggage in the carrier's depot over night and it was burned, it was held that the company was not liable therefor.² The obligation to exercise ordinary care in keeping and preserving property as to which they have been relieved from their peculiar liability as insurers, by the failure of the owner to call for his baggage within a reasonable time, is not a new and independent obligation, arising from the circumstance, accidental and unprovided for, of the property being left in the hands of the carrier. The duty is imposed by the contract of carriage, and therefore rests upon the carrier with whom the contract was made, although the place of destination is beyond its route, and upon the line of a connecting carrier.³ Where baggage which had arrived at its point of destination was left in the custody of the agent of the railroad company for the night, and during the same night the depot and contents, including the baggage, were destroyed by fire, it was held that, in order to make the company liable for the baggage so destroyed, it was incumbent on the owner to show that the fire was the result of such negligence on the part of the employés of the company as would render liable a bailee for hire.⁴

The rule may be said to be, that common carriers of passengers, with their ordinary baggage, for hire, are liable for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the acts of God or a public enemy; and this liability once commenced does not necessarily terminate with the transit, but *prima facie* continues until the safe delivery of the baggage to its owner. But when the passenger refuses to receive his baggage, or neglects to call for it within a reasonable time after the transit, the responsibility of the carriers is changed

¹ Louisville, &c. R. R. Co. v. Mahan, 8 Bush (Ky.), 135. See Torpey v. Williams, 3 Daly (N. Y.), 162; Klein v. Hamburg, &c. Packet Co., 3 Daly (N. Y.), 390.

² Morris v. Third Ave. R. R. Co., 1 Daly (N. Y. C. P.), 202; Jones v. Nor-

wich, &c. Transportation Co., 50 Barb. (N. Y.) 493.

³ Burnell v. New York, &c. R. R. Co., 45 N. Y. 184.

⁴ Louisville, &c. R. R. Co. v. Mahan, 8 Bush (Ky.), 184.

to that of a bailee, liable only for loss occasioned by his own neglect.¹

It makes no difference, so far as a common carrier's responsibility for the safety of a passenger's baggage is concerned, whether the passenger travels with his baggage, or whether it is carried without him.² But a carrier is not responsible for the loss of baggage which the passenger himself takes charge of. Thus, where passengers left a portion of the jewelry usually worn by them in the stateroom of a steamboat, and it was stolen, it was held that the carrier was not responsible therefor.³ But in some of the cases⁴ it is held that the mere supervision of his baggage by a passenger, or his having the means of entering the place of its deposit, is not sufficient to discharge the carrier from liability for its loss; and that there must either exist the *animus custodiendi* on the part of the passenger to the exclusion of the carrier, or he must be guilty of such negligence as excuses the latter from his general obligation; and that the proprietor of a steamboat is responsible for baggage of a passenger which he has locked up in his stateroom, but which is stolen therefrom on the journey.⁵ But where a passenger on an emigrant vessel retains his trunk in his own possession, and it is stolen, the owners of the ship are not liable. To render them liable it must be placed under their charge.⁶ Nor is a railroad company responsible for the loss of baggage or any property taken by a passenger into the car with him.⁷

But if the carrier interferes with a passenger's baggage while in a passenger-car, — as, if his servants remove it from one car to another, or attempt to do so, — and it is lost by reason of their negligence, he is responsible therefor. Thus, in a Massachusetts case,⁸ it appeared that the plaintiff, on leaving a sleeping-car to get his dinner, was informed by an employé of the defendant that his baggage, if left therein, would be safe; and upon his return he found

¹ Roth v. Buffalo, &c. R. R. Co., 34 N. Y. 548.

² Wilson v. Chesapeake, &c. R. R. Co., 21 Gratt. (Va.) 654.

³ The R. E. Lee, 2 Abb. (U. S.) 49.

⁴ Mudgett v. Bay State Steamboat Co., 1 Daly (N. Y. C. P.), 151.

⁵ See also to the same effect, where the boat-owner was held responsible for an overcoat hung up in his stateroom by a passenger, and which was stolen therefrom, Gore v. Norwich, &c. Transporta-

tion Co., 1 Daly (N. Y. C. P.), 254; S. P. Van Horn v. Kermit, 4 E. D. S. (N. Y. C. P.) 453; Crozier v. Boston, &c. Steamboat Co., 43 How. (N. Y.) Pr. 466; Duffy v. Thompson, 4 E. D. S. (N. Y. C. P.) 178.

⁶ Cohen v. Frost, 2 Duer (N. Y. Superior Ct.), 335.

⁷ Tower v. Utica, &c. R. R. Co., 7 Hill (N. Y.), 47.

⁸ Kinsley v. Lake Shore R. R. Co., 125 Mass. 54.

the car locked and detached, and was informed that he could have a seat in another sleeping-car, and would find his baggage there, but upon going there he found only part of his baggage. No previous notice of the change had been given him, and there was no evidence that he knew that the first car was not owned by the defendant, but by another company, who, by a contract with the defendant, provided conductors and servants therefor. The court held that the jury were warranted in finding that the missing bag was lost through the negligence of the defendant, and that the defendant was liable therefor, although the first car was not owned by it. So, while a carrier is not obliged to accept anything but ordinary baggage as baggage, yet, *if without extra compensation, and knowing that it is not personal baggage*, he permits it to be carried and treated as such, he is liable for its loss.¹

In a Missouri case,² a passenger delivered his trunk and a piece of carpeting to the baggage-master of a passenger train, and received a check for his trunk, but was told that no check was necessary for the carpet, as it would go safely; it was held that the railroad company was liable for the loss of the carpet, although by the printed rules of the company the baggage-master was forbidden to receive as baggage any article of merchandise. In an English case,³ pencil-sketches of an artist, placed in his portmanteau, were held not to form part of his ordinary luggage, so as to entitle them to be conveyed free of charge.⁴ And the "ordinary luggage," for which a railway company would be

¹ *Ross v. Missouri, &c. R. R. Co.*, 4 Mo. App. 582. In *Waldron v. Chicago, &c. R. R. Co.*, 1 Dakota, 351, the plaintiff, after buying a ticket for himself, son, and two daughters, pointed out to the baggage-master as his baggage three trunks and two boxes, one of which was a rough pine box, twenty inches square and ten inches deep, having nothing to which a check could be fastened, whereupon the baggage-master said he would place it in the baggage-car, and it would go just as safely, only that it would have to be looked after at M., or it might be taken beyond that station. On arriving at M. the pine box was missing. It appeared that one T. had bought a ticket to S., requesting the night baggage-master to check the box thereto; that T. unlocked and took from the box and presented to him a photograph of W.'s family; that T. then

locked the box and put a rope around it, whereto a check to S. was attached, and at S. the box was delivered to T. There was no other evidence than that stated, that T. was the plaintiff's agent, and the plaintiff denied any such agency. It was held that the company having received the box upon the passenger train without the plaintiff's having concealed the fact that it was not personal baggage, the fact that it was not such in fact did not save them from liability therefor.

² *Minter v. Pacific R. R. Co.*, 41 Md. 503.

³ *Munster v. South-Eastern Ry. Co.*, 4 Jur. N. s. 738; 27 L. J. C. P. 308; 4 C. B. N. s. 676; *Richards v. London, &c. Ry. Co.*, 7 C. B. 339; 18 L. J. C. P. 251.

⁴ *Mytton v. Midland Ry. Co.*, 28 L. J. Exch. 385.

held responsible, does not include a client's title-deeds, which an attorney may be carrying with him to produce in court; nor can the words be held to mean bank-notes (to a considerable amount), which may be packed in a bag or portmanteau by the attorney, to be carried for the purpose of defraying the expenses of the trial.¹ It has, however, been definitely decided that those articles only which travellers usually carry with them as part of their luggage come within the definition of ordinary or personal luggage, which a railway company is bound to carry with a passenger free of charge.² Thus, a child's toy, called a spring-horse, 78 lbs. in weight, and 44 inches in length, standing on a flat surface, is not within the regulation of a company allowing first-class passengers 112 lbs. of "personal luggage only (not being merchandise, or other articles carried for hire or profit) free of charge."³ It may, in many cases, be a question for the jury what a man's personal luggage consists of; for it may be allowable that a man should carry different articles with him, and that articles which, at one time and under one set of circumstances, should not be considered personal luggage might, at another time and under different circumstances, be looked at in that light. Thus, a man who was carrying in his portmanteau an article which was meant as a present to some one he was going to visit, might clearly regard that in the light of personal luggage while upon the journey to the residence of his friend, although it might not be such an article as "travellers usually carry with them as a part of their luggage."⁴

¹ *Phelps v. London & North-Western Ry. Co.*, 19 C. B. N. s. 321; 11 Jur. N. s. 552; 34 L. J. C. P. 259; 13 W. R. 782; 12 L. T. N. s. 496. But see, where a different rule of law was laid down, *Hopkins v. Westcott*, 6 Blatchf. (U. S. C. C.) 64; *Dunlap v. International, &c. Co.*, 98 Mass. 371.

² *Hudson v. Midland Ry. Co.*, L. R. 4 Q. B. 366.

³ *Hudson v. Midland Ry. Co.*, 10 B. & S. 504. See *Zunz v. South-Eastern Ry. Co.*, L. R. 4 Q. B. 539. See also, with regard to the arrangements of a company as to the amount of luggage to be carried by passengers travelling by cheap excursion trains, *Bumsey v. North-Eastern Railway Co.*, 14 C. B. N. s. 641; *Stewart v. London & North-Western Railway Co.*, 10 Jur. N. s. 805; *Walsh v. The*

H. M. Wright, 1 Newberry (United States), 494.

⁴ *Hudson v. Midland Ry. Co.*, L. R. 4 Q. B. 366; *The Ionic*, 5 Blatchf. (U. S. C. C.) 538. The baggage for which a carrier of passengers is liable is not limited to such apparel or other articles as are absolutely necessary or material for the use, comfort, or convenience of the passenger on his journey, or while away from his home. It may include articles of ordinary wearing-apparel, purchased on a journey to be carried home for the use of the passenger or for that of members of his immediate family. It should not be deemed to include articles purchased for a stranger, — *Dexter v. Syracuse, &c. R. R. Co.*, 42 N. Y. 326, — or presents for friends outside his immediate family. *Nevins v. Bay State, &c. Co.*, 4 Bosw. (N. Y.) 225.

In a later case, which came before the Court of Queen's Bench, the general principle that whatever a passenger takes with him for his personal use and convenience (and that is to be judged of in relation to his habits or wants¹ as a member of the particular class in society to which he belongs), either with a view to present necessities, or any purpose for which the journey is undertaken, is to be regarded as personal luggage, was affirmed. The circumstances were, shortly, these: The plaintiff was a passenger by the Great Western Railway from Liverpool to London, and took with him, as his personal luggage in a trunk, six pairs of sheets, six pairs of blankets, and six quilts. It appeared that he had given up his residence in Canada, and the articles contained in the trunk were intended for the use of his household when he should have provided himself with a home in London. The trunk was lost, and he sought to recover the value of the articles from the railway company. It was held that these articles could not be considered as personal, or "ordinary passengers' luggage." COCKBURN, C. J., remarked that "the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier. The articles as to which the question in the present case arises consisted of bedding. Now, though we are far from saying that a pair of sheets, or the like, taken by a passenger for his own use on a journey, might not fairly be considered as personal luggage, it appears to us that the quantity of articles of this description, intended, not for the use of the traveller on the journey, but for the use of his household when permanently settled, cannot be held to be so."² A feather-bed, necessary for a steerage passenger on a boat, and used by him on the journey, is baggage;³ but not when it is packed up and not intended for use on the voyage.⁴

In an English case,⁵ the plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the lug-

¹ *Per* ERLE, C. J., in *Phelps v. London Packet Co.*, 2 J. & S. (N. Y. Superior & Northwestern Ry. Co., 19 C. B. N. s. 321. Ct.) 521.

² *Macrow v. Great Western Ry. Co.*, ⁴ *Connolly v. Warren*, 106 Mass. 146.

L. R. 6 Q. B. 612.

⁵ *Munster v. South-Eastern Ry. Co.*, 4

³ *Hirschshon v. Hamburg American C. B. N. s. 676.*

gage-van a package (within the stipulated weight and dimensions) consisting of articles of wearing-apparel, and wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was to be at the company's risk. The package was left behind, and was afterwards taken to the lost-property office, where it was detained, and 6d. demanded for its restoration. It was held that the company was not justified in refusing to carry the package at its own risk, and was responsible for its detention.

SEC. 403. *Baggage-checks, effect of.* — Checks given for baggage are merely evidence of its having been received by the carrier, and of its non-delivery, but do not of themselves establish the carrier's liability therefor; because, if they are obtained under the pretence that the owner of the baggage is a passenger, and has obtained tickets for that journey, or is about to do so, when such is not the fact, the carrier cannot be held chargeable as such for the baggage. The contract from which his liability for the safe carriage of the baggage arises is the contract for the carriage of the passenger himself.¹ Consequently a contract to carry a passenger to a certain place, although it involves his transportation over several lines of railroads, is also operative as a contract to carry his baggage to the same point.² And in the case last cited, where a railroad company had an arrangement with a stage company to carry passengers and baggage from a certain point on its line to another point, it was held that, having issued a ticket to such place, it was liable for the loss of the passenger's baggage by the stage company.³ But if the passenger elects to do so, he may proceed directly against the carrier by whom the baggage was lost, — the only disadvantage in the latter instance being that he takes the burden of showing that the carrier sued lost the baggage, while if he proceeds against the first carrier, he is only called upon to prove the loss of the baggage, without being required

¹ *Chicago, &c. R. R. Co. v. Clayton*, 78 Ill. 616; *Davis v. R. R. Co.*, 22 Ill. 278; *Milnor v. New York, &c. R. R. Co.*, 53 N. Y. 363; *Dill v. R. R. Co.*, 7 Rich. (S. C.) L. 153; *Wilson v. Chesapeake, &c. R. R. Co.*, 21 Gratt. (Va.) 654.

² *Wilson v. Chesapeake, &c. R. R. Co.*, 21 Gratt. (Va.) 654.

³ See also, as to connecting lines of railroads, *Le Sage v. Great Western R. R.*

Co., 1 Daly (N. Y. C. P.), 306; *Hart v. Rensselaer R. R. Co.*, 8 N. Y. 37; *Weed v. Saratoga, &c. R. R. Co.*, 19 Wend. (N. Y.) 534; *Candee v. R. R. Co.*, 21 Wis. 582; *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 332; *Torpey v. Williams*, 3 Daly (N. Y. C. P.), 162; *Burnell v. New York Central R. R. Co.*, 45 N. Y. 484; *Cary v. Cleveland, &c. R. R. Co.*, 29 Barb. (N. Y.) 35.

to show by which carrier.¹ In a Virginia case,² it was held that railway-checks given for baggage are admissible in evidence to show what the carrier's undertaking was. In other words, they are admissible to show that a contract was in fact made and issued in connection with a through ticket,—an evidence to show that the carrier undertook to carry the passenger through or otherwise, according as the check is given through, or only for its own line. But the mere circumstance that a carrier gives a through check is not sufficient to establish his liability beyond his own line, unless it is also shown that he issued a through ticket. Thus, in a New York case,³ the defendant railroad issued to the plaintiff a check for baggage to the *terminus* of his journey, which covered its own line and a steamboat line which ran in connection therewith; but it did not issue a ticket to the passenger beyond its own line, and it was held that it could not be held liable for the loss of the baggage by the steamboat company. But if a passenger takes his baggage in the car with him over the first line, but procures it to be checked and carried in the baggage-car over the second, the first line cannot be held chargeable for the loss of the baggage, because it never had it in its custody.⁴ But if it received the baggage in the outset, the fact that it was rechecked at another point on the route and by another carrier does not change its liability.⁵ The possession of a railway baggage-check, accompanied by evidence of the baggage-master that, when required by passengers, he put checks on their baggage and gave duplicates to the passenger, is sufficient evidence that a person was a passenger on the cars, and that he had the baggage

¹ *Barter v. Wheeler*, 49 N. H. 9; *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88; *Coates v. United States Express Co.*, 45 Mo. 238; *Toledo, &c. R. R. Co. v. Merriam*, 52 Ill. 88; *Cincinnati, &c. R. R. Co. v. Pontius*, 19 Ohio St. 222; *McCormick v. Hudson River R. R. Co.*, 4 E. D. S. (N. Y. C. P.) 181; *Kessler v. New York Central R. R. Co.*, 61 N. Y. 533.

² *Wilson v. Chesapeake R. R. Co.*, *ante*.

³ *Green v. New York, &c. R. R. Co.*, 12 Abb. (N. Y.) Pr. n. s. 473.

⁴ *Straiton v. New York, &c. R. R. Co.*, 2 E. D. S. (N. Y. C. P.) 184.

⁵ *Candee v. Pennsylvania R. R. Co.*, 21 Wis. 582. See also *Mobile, &c. R. R. Co. v. Hopkins*, 41 Ala. 486. Holding

that the first carrier, issuing a through ticket and checking the baggage through, is liable for its loss, see *Chicago, &c. R. R. Co. v. Fahey*, 52 Ill. 81; *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 332; *Glasco v. New York Central R. R. Co.*, 36 Barb. (N. Y.) 557; *Check v. Little Miami R. R. Co.*, 2 Dis. (Ohio) 237; *Kessler v. New York Central R. R. Co.*, 7 Lans. (N. Y.) 62; *Najac v. Boston, &c. R. R. Co.*, 7 Allen (Mass.) 320. Or that the passenger may hold the line actually losing the baggage therefor, — *Burnell v. New York Central R. R. Co.*, 45 N. Y. 184; *Check v. Little Miami R. R. Co.*, *ante*; *Kessler v. New York Central R. R. Co.*, *ante*; *Burtis v. Buffalo, &c. R. R. Co.*, 24 N. Y. 269; *Root v. Great Western R. R. Co.*, 45 N. Y. 525.

checked.¹ Thus, in a South Carolina case,² a check in the possession of a passenger was held to be evidence that the passenger's baggage was delivered to the company, and, as a trunk is the usual receptacle for baggage, that a trunk with its contents was delivered to it. In a Kansas case,³ a passenger from New York to Junction City, Kan., delivered his checks for his baggage to the baggage-master of the defendant with the understanding that the defendant should forward it to Junction City; and this was held evidence to go to the jury to establish the fact that the defendant received the baggage. It is only *prima facie* evidence that the carrier received the passenger's baggage.⁴

SEC. 404. Rule when Passenger retains Possession of his Baggage, when it is treated as in possession of the Carrier.—In order to render a carrier liable for the loss of baggage, it is sufficient to show a delivery of the baggage to him; and from the time of such delivery, although some time in advance of the time when it will start upon its transit, the carrier is liable for it as a common carrier, and not as a warehouseman; and if it is lost *before* the time for it to start upon its transit, the carrier is liable. Thus, in a Connecticut case,⁵ the plaintiff took his trunk to the defendant's depot at Waterbury, at eleven o'clock A. M., and asked to have it checked to Bridgeport, on the train which started at three P. M. He was told that it was not their custom to check baggage until fifteen minutes before the train started, whereupon he left his trunk with the agent in the baggage-room, and at the customary time it was checked and put on the cars for Bridgeport. It was rifled after its delivery to the defendant, but whether before or after it left the station did not appear. The defendant asked the court to charge the jury that if the trunk was rifled after it was taken to the depot and before it was checked, there could be no recovery. The court refused so to charge, and upon appeal its ruling was sustained.⁶

In a New York case,⁷ the plaintiff sent his trunk to the defendants' depot at Peck's Slip, by an expressman, at about noon, April

¹ *Davis v. Cayuga, &c. R. R. Co.*, 10 How. (N. Y.) Pr. 330. In *Dill v. South Carolina R. R. Co.*, 7 Rich. (S. C.) 158.

² *Dill v. South Carolina R. R. Co.*, 7 Rich. (S. C.) 158.

³ *Kansas Pacific R. R. Co. v. Montelle*, 10 Kan. 119; *Davis v. Michigan, &c. R. R. Co.*, 22 Ill. 278; *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281.

⁴ *Chicago, &c. R. R. Co. v. Clayton*, 78 Ill. 616.

⁵ *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281.

⁶ *Jordan v. Fall River R. R. Co.*, 5 Cush. (Mass.) 69.

⁷ *Rogers v. Long Island R. R. Co.*, 56 N. Y. 620.

11, 1868. It was marked "Israel P. Rogers, Riverhead, L. I." The expressman found inside the depot gate, where he carried the trunk, two or three men unloading freight, of whom he inquired who took charge of the baggage. They told him, the man in the office. He saw the man in the office, and told him he had a trunk outside, and the man said "All right," and immediately sent two men to take care of it. The trunk was left by the expressman where the baggage was kept, and inside the defendants' enclosure and near their baggage-crate, which at that time was locked. The man in the office had been the defendants' ticket-agent for some years. The plaintiff went to the station at three o'clock, and bought a ticket to Riverhead, and called for his trunk, and it could not be found. The court held that these facts showed a delivery to the defendants, and were sufficient to charge them with the loss of the trunk. Of course a passenger is entitled to a reasonable time in which to call for his baggage after its arrival at its place of destination; but the question as to what is a reasonable time is one of fact, in view of the customs of the country, the manner and facilities for transporting baggage from the station, and all the surrounding circumstances; and what would be a reasonable time in one case might not be so in another.¹

SEC. 405. **Passenger must call for Baggage within a reasonable Time.** — Upon reaching its destination, the baggage must be called for within a reasonable time, or the liability of the company is changed from that of a carrier to that of a mere warehouseman. And what is a reasonable time depends upon the circumstances. It may be shown that the depot was at a distance from a hotel or village, and that there were no conveyances obtainable to take the baggage away, or that the passenger was sick and lame and unable to take charge of the baggage personally, to excuse the passenger from calling for his baggage upon the arrival of the train; and if it is shown that the defendants' agents agreed to let the baggage remain until called for, the carrier remains liable for it, *as carrier*, if it is called for within a reasonable time.² But in the latter case it was held that if baggage is left with the carrier for an unreasonable time without being called for, and no arrangement is made that the carrier shall retain it for him, and it is lost without the fault of the carrier, he is not liable therefor.³ A carrier of passengers is bound to deliver baggage to a passenger within a

¹ *Mote v. Chicago, &c. R. R. Co.* 27 Iowa, 22.

² See *Minor v. Chicago, &c. R. R. Co.*, 19 Wis. 40.

³ *Curtis v. Avon, &c. R. R. Co.*, 49 Barb. (N. Y.) 148.

reasonable time after its arrival.¹ And if the baggage is not left at the station for which it is checked, but is carried to another and there stored, and it is lost while there, he does not cease to be carrier and become a mere warehouseman as to the baggage, as would have been the case if it had been stored at the place to which it should have been carried.² In a New York case,³ the plaintiff's wife was a passenger upon the defendant road from N. to M. Immediately upon the arrival of the train at M. the depot-master placed the trunk in the baggage-room and went away. She waited fifteen minutes to get the trunk, but could find no one to deliver it. About three hours afterwards the plaintiff's son went to the depot for the trunk, but the depot-master was still absent. The son went in pursuit of him and returned with him, delivered the check, and the trunk was drawn out to the door; but meanwhile the conveyance which was employed to take the trunk had left and no other could be obtained, so it was left in charge of the baggage-master for the night. During the night it was stolen from the depot. It was held that the defendant's liability therefor as common carrier had not terminated. When baggage is lost, it is presumed to have been lost by the fraud or negligence of the carrier.⁴

SEC. 406. Limitations upon Liability of Carrier for Baggage. —

While a carrier is only bound to carry for a passenger a reasonable amount of baggage, and may make proper regulations relative thereto, yet, if he accepts an extra quantity without objection or extra charge, he is equally liable therefor as though it was within the specified amount.⁵ A carrier cannot defeat his liability as a common carrier for the loss of a passenger's baggage by a simple notice that all baggage is at the risk of the owner,⁶ printed either upon ticket or check,⁷ as there is no presumption that a passenger read either before entering upon his journey.⁸ Nor can he place himself in the position of a private carrier as to liability for such baggage, unless notice that he will only be liable as such therefor is brought home to the knowledge of the passenger before he enters upon his journey, and has an

¹ *Cary v. Cleveland, &c. R. R. Co.*, 29 Barb. (N. Y.) 85.

² *Toledo, &c. R. R. Co. v. Hammond*, 33 Ind. 379.

³ *Dinning v. New York & New Haven R. R. Co.*, 49 N. Y. 546.

⁴ *Garvey v. Camden, &c. R. R. Co.*, 4 Abb. (N. Y.) Pr. 171; *Camden, &c. R. R. Co., v. Baldauf*, 16 Penn. St. 67.

⁵ *Glasco v. New York Central R. R. Co.*, 36 Barb. (N. Y.) 557.

⁶ *Camden, &c. R. R. Co. v. Belknap*, 21 Wend. (N. Y.) 354.

⁷ *Rawson v. Pennsylvania R. R. Co.* 48 N. Y. 212.

⁸ *Malone v. Boston, &c. R. R. Co.*, 12 Gray (Mass.), 388; *Brown v. Eastern R. R. Co.*, 11 Cush. (Mass.) 97.

opportunity to recede from his position of a passenger by the carrier's line, if he so elects.¹ Nor, except possibly in two or three States can he limit his liability for the consequences of the negligence or wilful default or tort of himself or servants.² "Notice in the usual form," say the court in a New York case,³ "All baggage at the risk of the owners, though brought home to the knowledge of a passenger, will not in such cases excuse the company. Common carriers cannot by such notice excuse themselves from the implied agreement that the vessel, coach, or other vehicle used for the transportation of goods or baggage, is sufficient for the business in which it is employed."

SEC. 407. When Baggage is received by Carrier through mistake. —

If a carrier of passengers, through the mistake of a connecting carrier, receives from such carrier baggage which should be transported over another line, he is liable for its loss, although the person to whom such baggage belonged had no ticket, and was not a passenger over such line. Thus, in another New York case,⁴ the plaintiff took passage at Palmyra, on the defendant's road, for New York, and purchased a ticket and checked his trunk to the latter place. On his arrival in New York, the plaintiff, without calling for his baggage, went to Brooklyn, and the second day after his arrival presented his check and demanded his trunk, but it could not be found. An action was brought to recover the value of the trunk and contents. The referee found that the trunk was lost through the negligence of the defendants and their servants, and that the plaintiff was entitled to recover, upon which a judgment was entered, which was reversed by the General Term, in the first district, and a new trial ordered, from which the plaintiff appealed. The Supreme Court placed its decision upon the ground that the defendants' liability ceased with the transportation of the trunk by the Hudson River Railroad Company to New York, and its readiness to deliver it within a reasonable time after arrival, and that whatever responsibility was incurred afterward in keeping or storing it was incurred by the latter company, for which the defendants were not liable. The Court of Appeals held that the defendants were liable, and repudiated the ground taken by the Supreme Court.⁵

¹ *Logan v. Pontchartrain R. R. Co.*, 11 Rob. (La.) 24.

² *Camden, &c. R. R. Co. v. Burke*, 13 Wend. (N. Y.) 611.

³ *Mobile, &c. R. R. Co. v. Hopkins*, 41 Ala. 486; *Indianapolis, &c. R. R. Co. v. Cox*, 29 Ind. 360.

⁴ *Burnell v. New York Central R. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61.

⁵ *Cary v. Cleveland & Toledo R. R.*

SEC. 408. *Merchandise, etc.*—From what has been said, it will be seen that a railway company is not liable for the loss of merchandise or other articles not included under the term ordinary baggage, which have been delivered to it as baggage without disclosing their character.¹ It would certainly be very unjust to hold a carrier responsible for the loss of valuable articles of merchandise which are delivered to him as, and under the guise of, ordinary luggage, without giving him notice of the value, that he may exercise that degree of extra vigilance which he is likely to exercise when he knows that the value is large, and consequently that the luggage is more likely to be stolen. There can be no reason why the passenger should not take the risk, especially when he is aware, before he hands over his baggage to the carrier, that the latter will not accept it as baggage if he is informed of the contents, without extra compensation. Where it has been clearly understood that passengers are only to carry their ordinary luggage with them, and where the rates of conveyance have been calculated upon the understanding of casualties to such kinds of luggage only, it would be most unfair to allow persons to carry merchandise or money to a large amount, and in case of loss to hold the carrier liable. The implied offer and acceptance in the case of a passenger's luggage is, on the one hand, that the luggage shall be personal luggage; and, on the other hand, that the carrier will carry and insure all such personal luggage. Upon these grounds, it would be most unfair to regard a common carrier as liable in the case of the loss of merchandise which a passenger is carrying as if it was personal luggage. If, however, a passenger packs merchandise in such a way that the servants of a railway company or common carrier can see that it is merchandise, and if these servants make no objection to carrying it, or if they do not demand an extra charge, or a special bargain with regard to it, the company will be

Co., 29 Barb. (N. Y.) 85; *The Norway Plain Co. v. Boston & Maine R. R. Co.*, 1 Gray (Mass.), 271.

¹ *Michigan Central R. R. Co. v. Carrow*, 73 Ill. 348; *Cahill v. London & North Western Ry. Co.*, 10 C. B. n. s. 154; affirmed on appeal, 18 C. B. n. s. 818; *Belfast & Ballymena Ry. Co. v. Keys*, 9 H. L. Cas. 556; *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; *Mississippi Central R. R. Co. v. Kennedy*, 41 Miss. 671; *Cincinnati, &c. R. R. Co. v. Marcus*, 38 Ill. 219. The term "baggage," for which

passenger carriers are liable, if lost, does not include articles of merchandise not intended for personal use. *Collins v. Boston R. R. Co.*, 10 Cush. (Mass.) 606; *The Ionic*, 6 Blatchf. (U. S. C. C.) 538; *Dibble v. Brown*, 12 Ga. 83; *Bell v. Drew*, 4 E. D. S. (N. Y. C. P.) 59; *Stimson v. Connecticut, &c. R. R. Co.*, 44 N. H. 325; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Doyle v. Kyser*, 6 Ind. 242; *Richard v. London, Brighton, & South Coast Ry. Co.*, 7 C. B. 839.

responsible in case it is lost or damaged.¹ In such a case the railway company has, by its silence, modified its own permanent offer, and the contract is not the same as that which exists under ordinary circumstances; and, as the contract is not the same, the liability is different. It may be said that, if the carrier, through its servants or agents charged with the duty of receiving baggage, accepts as baggage articles of merchandise, or other property not personal baggage within the legal meaning of the term, *knowing the nature of the property*, they become liable therefor as baggage;² and according to the case first cited in the preceding note, this is the rule, even though the passenger fraudulently procured them to accept it as such. But it seems to be the better rule that in order to render a railway company or common carriers liable in such a case, it is necessary to charge them or their servants *with actual knowledge that the thing carried was merchandise, and not personal luggage*. It is not enough to show that there was sufficient apparent upon the article carried to have directed their attention to it, and to have caused them to make inquiries. In an English case,³ it appeared that the plaintiff had taken to a station a box labelled "glass," and had given it to a porter, who had placed it in the luggage-van; in the course of the journey it was lost, and the plaintiff brought the action to recover its value. The box contained merchandise, and not passenger's luggage; but it was contended, on behalf of the plaintiff, that the fact of the box being labelled "glass" was enough to indicate to the defendants that it contained merchandise, and that, as they accepted it without further charge, they were responsible. Judgment was given for the defendants, and ERLE, C. J., said: "It seems to me that it would be introducing a rule most pernicious to public convenience that a railway company, to avoid being fixed with liability, which according to their regulations, they do not intend to take, should be bound to

¹ Great Northern Ry. Co. v. Shepherd, 8 Exch. 30; Waldron v. Chicago, &c. R. R. Co., 1 Dakota, 351; Ross v. Missouri, &c. R. R. Co., 4 Mo. App. 582.

² Ross v. Missouri, &c. R. R. Co., *ante*; Waldron v. Chicago, &c. R. R. Co. *ante*. But *contra*, see Blumanth v. Fitchburg R. R. Co., 127 Mass. 322. If a carrier accepts and transports as baggage for a passenger, articles of merchandise, knowing them to be such, he assumes thereto the relation of a common carrier. Hannibal, &c. R. R. Co. v. Swift, 12 Wall. (U. S.) 262; Butler

v. Hudson River R. R. Co., 3 E. D. S. (N. Y. C. P.) 571. A trunk or valise containing samples of merchandise belonging to a merchant, but taken along by an agent to be used in procuring orders for similar goods, is not baggage for which a carrier is liable, even though he has checked it as baggage, but in ignorance of its contents. Stinson v. Connecticut River R. R. Co., 98 Mass. 83.

³ Cahill v. London, &c. Ry. Co., 30 L. J. C. P. 287.

make inquiries where a package is brought which appears likely to contain merchandise, and, if they do not make those inquiries, that they should be taken to know the contents of such package." The whole court held that the company had not knowledge that this was merchandise by the fact of the box being so labelled, and this decision was upheld by the Exchequer Chamber.¹

¹ *Cahill v. London, &c. Ry. Co.*, 31 L. J. C. P. 271.

CHAPTER XXVI.

INJURIES RESULTING IN DEATH.

SEC. 409. No Remedy at Common Law.	SEC. 414. Damages Recoverable.
410. Remedy given by Statute.	415. Limitation of Actions upon these Statutes.
411. Actions not necessarily Local.	416. Against whom Action should be brought.
412. Construction of these Statutes.	
413. Rules Applicable to this Class of Actions.	

SEC. 409. **No Remedy at Common Law.**—At the common law, where an injury received through the negligence of another results in death, no remedy can be had therefor;¹ and under the maxim *actio personalis moritur cum persona*, even though the person injured had commenced an action therefor but died during its pendency, the action abates, and cannot be revived by his personal representatives.² But generally, the remedy is saved by statute in the several States, either in favor of the estate or of the widow or children. In such cases, where death does not instantly ensue, the remedy is saved; but where the injury and death are simultaneous, the remedy never attaches, and consequently cannot survive. But if the deceased survived the injury for any, even the shortest space of time, so that a right of action attached to him, it survives under these statutes; and this is the case, even though the deceased was deprived of all consciousness and intelligence. But in such a case, there can be no recovery of substantial damages in the absence of any evidence of any considerable expense, loss, or damage incurred between the time

¹ Higgins v. Butcher, Yelv. 89; Baker v. Batton, 1 Camp. 498; Eden v. Lexington, &c. R. R. Co., 14 B. Mon. (Ky.) 204; Wyatt v. Williams, 43 N. H. 102; Campbell v. Rogers, 2 Handy (Cinn.), 110; Lucas v. N. Y. Central R. R. Co., 21 Barb. (N. Y.) 245; Whitford v. Panama R. R. Co., 23 N. Y. 465; State v. Grand Trunk R. R. Co., 58 Me. 176; State v. Manchester, &c. R. R. Co., 52 N. H. 528; Carey v. Berkshire R. R. Co., 1 Cush. (Mass.) 475; Conn. Mut. Life Ins. Co. v. N. Y. & New Haven R. R. Co., 25 Conn. 275; Worsley v. Cincinnati, &c. R. R. Co., 1 Handy (Cinn.), 481; Hyatt v. Adams, 16 Mich. 180; Kearney v. Boston, &c. R. R. Co., 9 Cush. (Mass.) 108; Wyatt v. Williams, 43 N. H. 102; Long v. Morrison, 14 Ind. 495.

² Cregin v. Brooklyn, &c. R. R. Co., 75 N. Y. 192; Whitford v. Panama R. R. Co., 23 N. Y. 465.

of the injury and the death.¹ The fact that death and the injury were not simultaneous, must be proved by the plaintiff, and it seems that survival must be shown by something more than a mere spasmodic twitching of the muscles of the body, which is consistent with the extinction of life.²

SEC. 410. *Remedy given by Statute.*—In several of the States a remedy is given by statute for a fatal injury resulting from the negligence of railway companies. In most of the States, the remedy is to be prosecuted by action in the name of the executor or administrator of the estate of the deceased, for the benefit of those relatives of the deceased specified in the statute; but in some of the States the remedy is by a prosecution in the name of the State, and the recovery is in the nature of a fine, which is distributed to such relatives of the deceased as the statute designates.³ As the remedy exists, and is created only by statute, it follows that it can only be pursued in the mode and under the conditions specified therein,⁴ and for the benefit of the persons named therein. In England and Pennsylvania the action is given for the benefit of the immediate family of the deceased, to the exclusion of the next of kin, and includes only husband and wife, parents and children.⁵ But in most of the States the remedy is for the benefit of the husband or widow, and next of kin; and in such cases, if there is neither husband nor widow, the remedy exists in favor of the next of kin,⁶ and depends, not upon their right to the services of the deceased, but upon the circumstance that they come within the class designated in the statute.⁷

¹ Tully v. Fitchburg R. R. Co., 134 Mass. 499.

² Haring v. N. Y. & Erie R. R. Co., 13 Barb. (N. Y.) 9.

³ This is the case in Maine, Massachusetts, and New Hampshire, and in Maryland the action is prosecuted in the name of the State, but is civil in form.

⁴ In Georgia under the statute, where the tort complained of is *prima facie* a felony, the father, in an action for causing the death of the child, must allege that he has prosecuted the agent of the company, on the criminal side of the court or set forth a sufficient excuse therefor. Allen v. Atlanta, &c. R. R. Co., 54 Ga. 503. But neither the acquittal nor conviction of such agent can have any effect in determining the right of recovery in the civil action. Cuttingham v. Weeks, 54 Ga. 275.

⁵ Penn. R. R. Co. v. Keller, 67 Penn. St. 300.

⁶ Quin v. Moore, 15 N. Y. 432; Green v. Hudson River R. R. Co., 2 Abb. Ct. App. Cas. (N. Y.) 277; Oldfield v. N. Y. & Harlem R. R. Co., 14 N. Y. 310; Tilley v. Hudson River R. R. Co., 24 N. Y. 471; Dickens v. N. Y. Central R. R. Co., 23 N. Y. 153; Kansas Pacific R. R. Co. v. Miller, 2 Cal. 442; Chicago, &c. R. R. Co. v. Major, 18 Ill. 349; Johnston v. Cleveland, &c. R. R. Co., 7 Ohio St. 336.

⁷ Oldfield v. N. Y. & Harlem R. R. Co., *ante*; Illinois Central R. R. Co. v. Barron, 5 Wall. (U. S.) 90; Chicago, &c. R. R. Co. v. Shannon, 43 Ill. 338; Quin v. Moore, *ante*. Under the Ohio statute, it is held that persons having no legal claim for support upon the deceased, may as next of kin have an action maintained for

Where the statute is for the benefit of the husband, widow, parents, and children of the person killed, only one action can be maintained.¹ It is not deemed advisable in this work to enter particularly into a consideration of the statutes of each State, as they are quite dissimilar, but to confine the treatment of this topic to the general heads, which are applicable under most of the statutes.

SEC. 411. Actions not necessarily Local.—Actions arising under these statutes are held by some of the cases to be local, and not maintainable out of the State in which the injury was committed, although a statute giving a remedy in such cases exists in such State,² or the person injured died in the State in which the action is brought.³ But these cases are believed to rest upon an erroneous ground, and except where the statute limits the remedy to an action prosecuted in the courts of the State, the better opinion seems to be that an action may be brought and prosecuted in the courts of any State having jurisdiction of the parties.⁴ In the case cited from the United States Supreme Court,⁵ A. died in New Jersey from injuries there received, for which, if death had not ensued, B., the party inflicting them, would have been liable to an action for damages. The statute of that State provided that such an action might be brought against the party by the personal representative of the deceased. C., appointed under the laws of New York administratrix of A., brought, in a court of the latter State, a suit against B., which, by reason of the citizenship of the parties, was removed to the United States Circuit Court. It was held that the action could be maintained upon the ground that where a right of action has become fixed, either by the common law or the statute, and a

their benefit to recover the compensation allowed by statute. *Grotemeyer v. Harris*, 25 Ohio St. 510. In New Hampshire it is held that a railway company indicted for negligently causing the death of a person can have no benefit from the circumstance that the heirs of the person killed have assigned their claim. *State v. Boston & Maine R. R. Co.*, 58 N. H. 410.

¹ *Houston, &c. R. R. Co. v. Moore*, 49 Tex. 31; *Galveston, &c. R. R. Co. v. La Gierse*, 51 Tex. 189.

² *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294; *Woodard v. Michigan, &c. R. R. Co.*, 10 Ohio St. 120; *Richardson v. N. Y. Central R. R. Co.*, 88 Mass. 85; *McCarthy v. Chicago, &c. R. R. Co.*, 18

Kan. 46; *Allen v. Pittsburgh, &c. R. R. Co.*, 45 Md. 41; *Mackey v. New Jersey Central R. R. Co.*, 14 Blatchf. (U. S. C. C.) 65; *Le Forest v. Tolman*, 117 Mass. 109.

³ *McCarthy v. Chicago, &c. R. R. Co.*, *ante*.

⁴ *Dennick v. Central R. R. Co.*, 108 U. S. 11; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; 38 Am. Rep. 491. A provision in the Wisconsin statute excluding the jurisdiction of the Federal courts in this class of cases was held to be unconstitutional. *Chicago, &c. R. R. Co. v. Whitton*, 13 Wall. (U. S.) 270.

⁵ *Dennick v. Central R. R. Co.*, 108 U. S. 11.

legal liability has been incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. MILLER, J., in the course of an opinion in which he ably and carefully considers the questions involved, said: "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the northern district, were competent to try such a case when the parties were properly before it.¹ We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else, because it depended upon statute law, and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases.² But it is said, that conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction. The statute does not say this in terms. 'Every such action shall be brought by and in the name of the personal representatives of such deceased person.' It may be admitted that for the purpose of this case the words 'personal representatives' mean the administrator. The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of the view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or

¹ See *Mostyn v. Fabrigas*, 1 Cowp. 161; 614; *Lowry v. Inman*, 46 N. Y. 119; *Rafael v. Verelst*, 2 W. Bl. 1055; *Mc-Pickering v. Fisk*, 6 Vt. 102; *Railroad Co. v. Fisk*, 1 How. (U. S.) 241.

² *Ex parte Van Riper*, 20 Wend. (N. Y.) 341; *Great Western R. R. Co. v. Miller*, 19 Mich. 305.

appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here also, by construction, 'if they reside in the State of New Jersey'? It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say it depends on the appointment of an administrator within the State?"

In a New York case¹ the court adopted a similar rule distinguishing several cases in the court of that State to the contrary,² but confines the rule to instances where the statute in the State where the injury occurred, and where the action is brought, contains similar provisions, giving or preserving a remedy. The benefits of such statutes are not confined to citizens of the State, but inure to the benefit of the class named therein, without reference to the residence of the beneficiaries, or the place where the deceased had his domicile.³

SEC. 412. Construction of these Statutes. — These statutes have received diverse constructions in the different States. In New York it is held that the statute gives a remedy whether the death was instantaneous or not;⁴ and the same rule is also adopted in Tennessee, and probably in all the States where a civil remedy is given.⁵ In Maine, however, it is held that proceedings by indictment can only be had where the death is instantaneous, upon the ground that, inasmuch as this remedy is given for the benefit of the persons who would be entitled to a remedy if the person injured survived the injury for any space of time, the remedy by action supersedes the statutory remedy; that is, that the remedy by indictment ends when the remedy by action begins.⁶ But in Massachusetts the rule

¹ *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. See also *Stallknecht v. Penn. R. R. Co.*, 13 Hun (N. Y.), 451; *Western, &c. R. R. Co. v. Strong*, 52 Ga. 461; *Nashville, &c. R. R. Co. v. Eakin*, 6 Cald. (Tenn.) 582; *Selma, &c. R. R. Co. v. Lacey*, 49 Ga. 106.

² The court distinguishes the following cases from the principal case: *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Beach v. Bay State S. B. Co.*, 30 Barb. (N. Y.) 433; *McDonald v. Mallory*, 77 N. Y. 547; *Mohler v. Norwich & N. Y. Trans. Co.*, 35 N. Y. 352.

³ *Nashville, &c. R. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341. In this case the injury occurred in Mississippi, and it was held that the action might be brought in Tennessee. *Hartford, &c. R. R. Co. v. Andrews*, 36 Conn. 213; *Jeffersonville R. R. Co. v. Swayne*, 41 Ind. 48.

⁴ *Brown v. Buffalo, &c. R. R. Co.*, 22 N. Y. 191.

⁵ *Fowlkes v. Nashville, &c. R. R. Co.*, 5 Baxt. (Tenn.) 663.

⁶ *State v. Grand Trunk R. R. Co.*, 61 Me. 114; *State v. Maine Central R. R. Co.*, 60 Me. 490.

SEC. 413.] RULES APPLICABLE TO THIS CLASS OF ACTIONS. 1535

is otherwise.¹ In some of the States the parties may elect their remedy,² and a judgment in one action is a bar to the other.³ But in some of the States the remedies are held to be concurrent, and an action may be maintained for the intestate's damages up to the time of his death, and also another action for the injury to the survivors by the intestate's death.⁴

SEC. 413. *Rules Applicable to this Class of Actions.* — It is needless to say that actions under these statutes must be brought by the persons designated therein, and within the time, and in the manner therein provided. If the statute provides that the action shall be brought by the executor or administrator of the deceased, *no other person can maintain an action*;⁵ and if the damages recovered are for the benefit of the husband, widow, parent, or next of kin, the declaration must allege the fact, and the existence of such beneficiary, as, if no beneficiary survives the deceased, no recovery can be had.⁶ In the trial of actions under these statutes, whether by indictment or action, the same rules of evidence prevail as would prevail if the action was brought by the deceased himself, and the negligence of the company must be established as fully in the one case as in the other;⁷ and the company is exonerated from liability if the deceased was guilty of negligence which contributed to the injury,⁸ or if the in-

¹ *Com. v. Metropolitan R. R. Co.*, 107 Mass. 236.

² *Hunsford v. Payne*, 11 Bush (Ky), 380.

³ *Hunsford v. Payne*, *ante*. In *Com. v. Metropolitan R. R. Co.*, 107 Mass. 346, this question was not decided.

⁴ *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294; *Hyatt v. Adams*, 16 Mich. 180; *Barley v. Chicago, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 430; *Eden v. Lexington, &c. R. R. Co.*, 14 B. Mon. (Ky.) 204; *Long v. Morrison*, 14 Ind. 595; *Cregin v. Brooklyn, &c. R. R. Co.*, 75 N. Y. 192. Such also is the rule in the English courts. *Bradshaw v. Lancashire, &c. Ry. Co.*, L. R. 10 C. P. 189.

⁵ *Wilson v. Bumstead*, 12 Neb. 1; *Nash v. Tansly*, 28 Minn. 5.

⁶ *Schwarz v. Judd*, 28 Minn. 371.

⁷ *State v. Grand Trunk R. R. Co.*, 58 Me. 176; *Hendricks v. Western, &c. R. R. Co.*, 52 Ga. 467; *Louisville, &c. R. R. Co. v. Connor*, 2 Baxt. (Tenn.) 382; *Baltimore, &c. R. R. Co. v. Whittington*, 30

Gratt. (Va.) 805; *Safford v. Drew*, 3 Duer (N. Y.), 627; *Woodard v. Chicago, &c. R. R. Co.*, 23 Wis. 400; *State v. Consolidated European, &c. R. R. Co.*, 67 Me. 479; *Com. v. Eastern R. R. Co.*, 5 Gray (Mass.), 473; *Terry v. Jewett*, 17 Hun (N. Y.), 395; *Creed v. Penn. R. R. Co.*, 86 Penn. St. 139.

⁸ *Chicago, &c. R. R. Co. v. Van Patten*, 74 Ill. 91; *Karle v. Kansas, &c. R. R. Co.*, 55 Mo. 476; *Penn. R. R. Co. v. James*, 81½ Penn. St. 194; *Toledo, &c. R. R. Co. v. Grable*, 88 Ill. 441; *Starry v. Dubuque, &c. R. R. Co.*, 51 Iowa, 419; *Cincinnati, &c. R. R. Co. v. Eaton*, 53 Ind. 307; *State v. Manchester, &c. R. R. Co.*, 52 N. H. 528; *Willette v. Buffalo, &c. R. R. Co.*, 14 Barb. (N. Y.) 585; *Baker v. New Jersey, &c. R. R. Co.*, 30 N. J. Eq. 240; *Darling v. Williams*, 35 Ohio St. 58; *Richmond, &c. R. R. Co. v. Anderson*, 31 Gratt. (Va.) 812; *Ohio, &c. R. R. Co. v. Tindall*, 13 Ind. 366; *Baltimore, &c. R. R. Co. v. Sherman*, 30 Gratt. (Va.) 602; *Pittsburgh, &c. R. R. Co.*, 87 Penn. St. 405; *McCarty*

jury resulted from the negligence of a co-servant.¹ Indeed it would seem that in order to uphold an action, the injury must have been inflicted under such circumstances that the deceased, if he had survived the injury, could have maintained an action.² If the deceased survived the injury, and settled with the company, but died within a year and a day from the time the injury was received, from the effect thereof, no recovery can be had under the statute, because but one compensation is contemplated.³

SEC. 414. Damages Recoverable.—The theory of the statute is, that the next of kin, or persons designated in the statute to whom the compensation provided for therein shall be paid, have a pecuniary interest in the life of the person killed, and consequently the amount of such recovery is limited by the value of such interest.⁴ The rule may be said to be that the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased is the true criterion by which to determine the amount of damages to be given; and in this view, evidence of the age, habits of industry, means, business, etc., of the deceased are held to be admissible.⁵ Such damages should be assessed as will be a just compensation to the surviving widow and children for the death of the husband and parent; but if the widow dies before the trial, the question of compensation to her no longer exists, and proof on that point is irrele-

v. Delaware & Hudson Canal Co., 17 Hun (N. Y.), 74; *Moody v. Pacific R. R. Co.*, 68 Mo. 476; *Chicago, &c. R. R. Co. v. Mock*, 88 Ill. 87.

¹ *Kumler v. Junction R. R. Co.*, 33 Ohio St. 150; *Beauchamp Coal Co. v. Cooper*, 12 Ill. App. 373; *Proctor v. Hannibal, &c. R. R. Co.*, 64 Mo. 112; *Sherman v. Rochester, &c. R. R. Co.*, 15 Barb. (N. Y.) 574; *State v. Maine Central R. R. Co.*, 60 Me. 490; *McMillan v. Saratoga, &c. R. R. Co.*, 20 Barb. (N. Y.) 449; *Elliott v. St. Louis, &c. R. R. Co.*, 67 Mo. 272.

² *Quincy Coal Co. v. Hood*, 77 Ill. 68.

³ *Fowlkes v. Nashville, &c. R. R. Co.*, 5 Baxt. (Tenn.) 663; *Dibble v. N. Y. & Erie R. R. Co.*, 25 Barb. (N. Y.) 183. But see *South, &c. R. R. Co. v. Sullivan*, 59 Ala. 272, *contra*.

⁴ *Comstock, J.*, in *Quin v. Moore*, 15 N. Y. 432; *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294; *Paulmier v. Erie*

R. R. Co., 34 N. J. L. 151; *Little Rock, &c. R. R. Co. v. Barker*, 33 Ark. 350.

⁵ *Burton v. Wilmington, &c. R. R. Co.*, 8 N. C. 504. But see *Yonge v. Kinney*, 28 Ga. 111; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356; *Telford v. Northern R. R. Co.*, 30 N. J. L. 188; *Donaldson v. Mississippi, &c. R. R. Co.*, 18 Iowa, 280; *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252; *Illinois Central R. R. Co. v. Welden*, 52 Ill. 290; *Macon, &c. R. R. Co. v. Johnson*, 38 Ga. 409; *Atlanta, &c. R. R. Co. v. Ayers*, 53 Ga. 12; *Denver, &c. R. R. Co. v. Woodard*, 4 Col. 1; *Kansas, &c. R. R. Co. v. Lundin*, 3 Cal. 94; *David v. So. Western R. R. Co.*, 41 Ga. 223; *Penn. R. R. Co. v. Butler*, 57 Penn. St. 335; *Catawissa R. R. Co. v. Armstrong*, 52 Penn. St. 282; *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323; *Kesler v. Smith*, 66 N. C. 154; *Walters v. Chicago, &c. R. R. Co.* 41 Iowa, 71; *Mansfield Coal &c. Co. v. McEnery*, 37 Leg. Int. 28.

vant; the only question left to be determined is, what will be a just compensation to the children for the loss of the father; and in determining this question, the fact that there had been a surviving widow is to be left entirely out of the case; but the business, education, and habits of sobriety and economy of the deceased may be considered.¹ The receipt of money by those for whose benefit the action is brought, on a policy of insurance on the life of the deceased, cannot be shown, to reduce the amount of recovery.² Nor can an insurance company which has paid a policy on the life of the deceased maintain an action against the wrong-doer.³

It is not proper to admit evidence that the deceased was the sole support of the beneficiary,⁴ nor, except in cases where exemplary damages are recoverable, to show the pecuniary condition of the defendant.⁵ Where the injury from which the person died was inflicted by the gross negligence of the company, it is held in some of the States, under peculiar statutes, that exemplary damages are recoverable.⁶ But in view of the rule that the damages must be pecuniary and actual, it is generally held, and as we believe correctly, that exemplary damages are not recoverable. But in California the statute provides that the jury may give damages, "pecuniary or exemplary." So also in Kentucky the statute authorizes "vindictive damages." In Missouri the damages are to be given with reference to the "mitigating or aggravating circumstances," — which clearly contemplates exemplary damages in a proper case. In Texas such damages are recoverable under the provisions of the constitution.⁷

¹ Taylor v. Western Pacific R. R. Co., 45 Cal. 323.

² Sherlock v. Alling, 44 Ind. 184; Harding v. Townsend, 43 Vt. 536; Althorpe v. Wolfe, 22 N. Y. 355; Pittsburgh, &c. R. R. Co. v. Thompson, 56 Ill. 138; Kellogg v. N. Y. Central, &c. R. R. Co., 79 N. Y. 72; Bradburn v. Great Western Ry. Co., L. R. 10 Exchq. 1.

³ Conn. Mut. Life Ins. Co. v. N. Y. & New Haven R. R. Co., 25 Conn. 265.

⁴ Northwestern, &c. R. R. Co. v. Moranda, 93 Ill. 302. But see *contra*, International, &c. R. R. Co. v. Kindred, 57 Tex. 491. In Beems v. Chicago, &c. R. R. Co., 58 Iowa, 150, it was held not admissible to show upon the question of damages, the number of the intestate's family. But it seems that it is competent to show that the beneficiary is an invalid, or "otherwise incapacitated from earning a living,"

and has a daughter to educate and support. Cook v. Clay St. Hill R. R. Co., 60 Cal. 601. And in this case, where the action was in the name of the widow, it was held admissible to show that the deceased was a kind and good husband and father. But see Quinn v. Power, 29 Hun (N. Y.), 183, where letters from the deceased's son to his father which tended to show his affection and good intentions towards his father and family were held not admissible. This is upon the ground that such assurances have no legal force, and consequently no tendency to establish damage.

⁵ Morgan v. Durfee, 69 Mo. 469.

⁶ Haley v. Mobile, &c. R. R. Co., 7 Bart. (Tenn.) 239.

⁷ Galveston, &c. R. R. Co. v. La Gierse, 51 Tex. 189; Southern Cotton Press Co. v. Bradley, 52 Tex. 587.

Such damages are also held to be recoverable in some of the other States.¹ But even in these States, exemplary damages are only recoverable where they would be recoverable if the action had been brought by the deceased himself. The damages must be proved, and if there is no evidence as to pecuniary loss, only nominal damages should be given, and a verdict for substantial damages will be set aside.² But in New Hampshire the statute provides that the recovery shall be by fine not exceeding five thousand dollars nor less than five hundred dollars.

The rule of damages in this class of actions is necessarily different from what the rule would be if the action had been brought by the deceased himself. In that case the recovery would embrace damages for the personal wrong, and his mental and physical pain and suffering; but in this class of actions those elements are excluded, as also the mental anxiety, sorrow, and grief of the relatives for whose benefit a recovery is permitted,³ except, as is the case in some of the

¹ *Baltimore, &c. R. R. Co. v. Raell*, 32 Gratt. (Va.) 394; *Kansas, &c. R. R. Co. v. Miller*, 2 Cal. 442.

² *Houghkirk v. Del. & Hud. Canal Co.*, 92 N. Y. 219. In this case a verdict for \$5,000 was set aside, there being no proof of damage; reversing 28 Hun (N. Y.), 407; *Keller v. N. Y. Central R. R. Co.*, 2 Abb. Ct. App. (N. Y.) 480; *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 310; *McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y. 287; *Quin v. Moore*, 15 N. Y. 432; *Mitchell v. N. Y. Central R. R. Co.*, 2 Hun (N. Y.), 535; *Chicago, &c. R. R. Co. v. Shannon*, 43 Ill. 338; *Illinois Central R. R. Co. v. Welden*, 52 Ill. 290. But it has been held that when the age, habits of industry, etc., of the deceased are shown, the jury may infer substantial damages from such proof. *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *Ihl v. Forty-Second St. R. R. Co.*, 47 N. Y. 317; *Rockford, &c. R. R. Co. v. Delaney*, 82 Ill. 198; *Chicago v. Scholten*, 75 Ill. 468.

³ *Duckworth v. Johnson*, 4 H. & N. 638; *Oldfield v. Harlem R. R. Co.*, 14 N. Y. 310; *Green v. Hudson River R. R. Co.*, 32 Barb. (N. Y.) 25; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188; *Pym v. Gt. Northern R. R. Co.*, 4 B. & S. 396; *Blake v. Midland Ry. Co.* 18 Q. B. 93; *Ohio, &c. R. R. Co. v. Tindall*, 13 Ind. 366; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y. 287; *Huntington, &c. R. R. Co. v. Decker*, 84 Penn. St. 419; *Penn. R. R. Co. v. Keller*, 67 Penn. St. 300; *Penn. R. R. Co. v. Ogler*, 35 Penn. St. 66; *North Penn. R. R. Co. v. Robinson*, 44 Penn. St. 175; *State v. Baltimore, &c. R. R. Co.*, 24 Md. 84; *Covington St. R. R. Co. v. Packer*, 9 Bush (Ky.), 455; *Baltimore, &c. R. R. Co. v. Wightman*, 29 Gratt. (Va.) 43. But see *Baltimore, &c. R. R. Co. v. Noell*, 32 Gratt. (Va.) 394, where such damages were held to be recoverable. *Potter v. Chicago, &c. R. R. Co.*, 21 Wis. 372; *Costello v. Landwehr*, 28 Wis. 522; *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294; *Chicago v. Major*, 18 Ill. 349; *Barley v. Chicago, &c. R. R. Co.* 4 Biss. (U. S. C. C.) 430; *Chicago, &c. R. R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Chicago, &c. R. R. Co. v. Shannon*, 43 Ill. 338; *Chicago, &c. R. R. Co. v. Harwood*, 80 Ill. 88; *Chicago, &c. R. R. Co. v. Becker*, 76 Ill. 25; *Kansas, &c. R. R. Co. v. Cutter*, 19 Kan. 83; *Donaldson v. Mississippi, &c. R. R. Co.*, 18 Iowa, 280; *Jeffersonville, &c. R. R. Co. v. Swayne*, 26 Ind. 477; *Little Rock, &c. R. R. Co. v. Barker*, 33 Ark. 550; *Hyatt v. Adams*, 16 Mich. 180; *Covington, &c. R. R. Co. v. Packer*, 9 Bush (Ky.), 455; *Dalton v. South-Eastern Ry. Co.* 4 C. B. N. s. 296. In an action

States, the statute expressly provides that the pain and suffering of the deceased shall form an element of damage.¹ The difficulty of laying down any accurate general rule for the estimation of damages in these cases is quite apparent, and necessarily much is left to the discretion of the jury in view of the facts proved. But the courts exercise a careful supervision over such verdicts, and will set them aside if they are so excessive as to evince passion or prejudice, or are largely in excess of what the evidence warrants.² The expenses of medical attendance, nursing, funeral expenses, etc., are all elements of damage where any of the persons for whose benefit a recovery is permitted is legally bound to pay them, although all are not so bound to pay them.³

In the case of an action brought for the benefit of minor children for negligently causing the death of the mother, the age of the children is to be taken into account, as well as the loss of the nurture and instruction, moral and physical; and the general care and training which a mother usually bestows upon children is to be considered, without any limitation to the period of minority; and her capacity for such duties should be shown by proof.⁴ In an action for

to recover damages for wrongfully causing the death of another, brought under the Illinois statute, only the amount of the actual pecuniary loss can be allowed; nothing can be added for grief or loss of society. *Brady v. Chicago*, 4 Biss. (U. S. C. C.) 448. On the trial of an action for causing death, the plaintiff, who was husband of the intestate, proved no special damage. It was held that, even if the defendant was liable, nominal damages only could be recovered. *Mitchell v. New York, &c. R. R. Co.*, 2 Hun (N. Y.), 535. But in an action against a railroad company to recover for the loss of services of the plaintiff's wife, by her being killed through alleged negligence of the company, an instruction that the jury might consider the loss sustained by deprivation "of regular attendance, services, and comfort of his wife's society," was held to be proper; the "comfort" could not be separated from the service. *Cregin v. Brooklyn Croastown R. R. Co.*, 19 Hun (N. Y.), 341. So in an action against a railroad company by the administrator of a passenger killed on its road, who was unmarried and lived with his mother, instructions to the jury to assess the dam-

ages not only for the pecuniary loss sustained by the mother, but also for the loss of his care to her, and for her mental anguish, provided the damages did not exceed \$10,000, was held to be correct under Virginia laws. *Baltimore & Ohio R. R. Co. v. Noell*, 32 Gratt. (Va.) 394.

¹ *Nashville, &c. R. R. Co. v. Prince*, 2 Heisk. (Tenn.) 680; *Collins v. East Tenn. R. R. Co.*, 9 Heisk. (Tenn.) 841; *Nashville, &c. R. R. Co. v. Stevens*, 9 id. 12; *Nashville, &c. R. R. Co. v. Smith*, 6 id. 174.

² *Sherman v. Western Stage Co.*, 24 Iowa, 515; *Nashville, &c. R. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Penn. R. R. Co. v. Zebe*, 33 Penn. St. 318; *Chicago, &c. R. R. Co. v. Austin*, 69 Ill. 426; *Lake Shore R. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307; *Etherington v. Prospect Park, &c. R. R. Co.*, 88 N. Y. 641; *Chicago, &c. R. R. Co. v. Bayfield*, 37 Mich. 205; *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246.

³ *Murphy v. N. Y. Central, &c. R. R. Co.*, 88 N. Y. 445.

⁴ *Chicago, &c. R. R. Co. v. Austin*, 69 Ill. 426; *Illinois Central R. R. Co. v. Weldon*, 52 Ill. 290.

the benefit of the widow and children the damages are confined to such a sum "as the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for their benefit, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures," and omitting anything for grief or sorrow over his death.¹

In a Virginia case² the rule was stated to be that such damages should be assessed, (1) by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime, if he had not been killed; and (2) by adding these to the value of his services in the superintendence, attention to, and care of his family and the education of his children, of which they have been deprived by his death. The damages recoverable by the widow for causing the death of the husband may be estimated with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future; and she is entitled to such sum as, in a pecuniary point of view, would make her whole.³ In an action by a parent to recover for the negligent killing of his minor child, it is presumed that the parent sustains a loss from the loss of such child's services, and allowance is to be made therefor;⁴ and it is not indispensable there should be proof of actual services of pecuniary value rendered to the next of kin, nor that any witness should express an opinion as to the value of such services, before a recovery can be had. Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship will warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation under the statute may be given.⁵

¹ Penn. R. R. Co. v. Butler, 57 Penn. St. 335; Illinois, &c. R. R. Co. v. Baches, 55 Ill. 379; Kansas, &c. R. R. Co. v. Cutter, 19 Kan. 83; Huntingdon, &c. R. R. Co. v. Decker, 84 Penn. St. 419; March v. Walker, 48 Tex. 372. But see Benson v. Green Mountain Gold Mining Co., 57 Cal. 20, where loss of society is held to be an element of damage.

² Baltimore, &c. R. R. Co. v. Wightman, 29 Gratt. (Va.) 431.

³ Rafferty v. Buckman, 46 Iowa, 195.

⁴ Rockford, &c. R. R. Co. v. Delaney, 82 Ill. 198; Chicago v. Hesing, 83 Ill. 204.

⁵ Chicago v. Scholten, 75 Ill. 468.

And testimony is admissible respecting the general nature of the employment of the decedent's father, that the jury may consider its probable effect in determining the pursuits of decedent. The Carlisle life-tables are also admissible to show the expectancy of life. The computation, however, should be made from the date of decedent's death, and not from the age of twenty-one, although recovery dates from that time.¹ Substantial damages may be recovered, notwithstanding such recovery must be based upon the probable accumulation of an estate after the infant has reached his majority.² And where the action is for the benefit of a parent, evidence has been held to be admissible to show such parent's probable need of the services of the child.³ As a rule, the recovery is to be limited to the value of such services until the child would attain the age of majority, unless there are facts which warrant a reasonable expectation of a pecuniary benefit therefrom after the child attains that age.⁴ If the action is brought to recover for the death of an adult child, it must be shown that it was at the time residing with the parent, or that it had never been emancipated from the family, and was at the time contributing towards the parent's support, or had promised to do so.⁵ Of course, where an action is brought by a husband to recover for the killing of his wife, or by a wife to recover for the killing of her husband, the relation must be proved as in other cases.⁶ Where an action is brought for the benefit of collateral next of kin whom the deceased was not legally bound to support, they must show either that they had actually been supported by him, or that there was a probability that they would have received support or pecuniary benefit from him if he had lived.⁷

SEC. 415. Limitation of Actions upon these Statutes. — In many of these statutes it is provided that the action shall be brought within two years from the time of the death of the person injured; and in such cases there can be no question as to when the statute

¹ *Walters v. Chicago, R. I., & P. R. R. Co.*, 41 Iowa, 71.

² *Walters v. Chicago, R. I., & P. R. R. Co.*, 41 Iowa, 71.

³ *Ewen v. Chicago, &c. R. R. Co.*, 38 Wis. 613.

⁴ *Potter v. Chicago, &c. R. R. Co.*, 21 Wis. 372; *Penn. R. R. Co. v. Zebe*, 33 Penn. St. 318; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188; *Houston, &c. R. R. Co. v. Mixon*, 52 Tex. 19; *Rockford, &c. R. R. Co. v. Delaney*, 82 Ill. 198.

⁵ *Penn. R. R. Co. v. Adams*, 55 Penn. St. 499; *Penn. R. R. Co. v. Keller*, 67 Penn. St. 499; *Franklin v. South-Eastern Ry. Co.*, 3 H. & N. 211.

⁶ *Toledo, &c. R. R. Co. v. Brooks*, 81 Ill. 245; *Conant v. Griffin*, 48 Ill. 410; *Kansas, &c. R. R. Co. v. Miller*, 2 Cal. 442.

⁷ *Dunhene v. Ohio Life & Trust Co.* 1 Dis. (Ohio) 257; *Chicago, &c. R. R. Co. v. Moranda*, 93 Ill. 302; *Gratinkemper v. Harris*, 25 Ohio St. 510.

begins to run ; and where the statute is silent upon that point, the statute begins to run from the time of the death ;¹ and this is held to be the case where the action is required to be brought by an administrator, although an administrator has not been appointed.² This provision of the statute is in the nature of a *condition* rather than a limitation, and cannot be enlarged for any cause,³ and need not be pleaded. This condition only applies to the statutory remedy, and has no application where the party has a remedy at common law and pursues it, — as, where a parent sues for loss of service, medical attendance, nursing and other expenses, where a child dies of an injury inflicted by the negligence of another.⁴

SEC. 416. **Against whom Action should be brought.** — The action should be brought against the person or corporation or individual who was legally in possession of, and operating the railway at the time when the injury causing death was inflicted. If a lessee is in possession under a lease which the company had authority to execute, or if a mortgagee is lawfully in possession under a mortgage, the action can only be brought against the lessee, mortgagee, or other person or corporation lawfully in possession of the road ; but if the possession, although authorized by the company, yet is without legal authority, the company itself is also liable.⁵ But under no circumstances can the stockholders, as such, be held chargeable.⁶

¹ *Waldo v. Goodsell*, 33 Conn. 432.

² *Jeffersonville, &c. R. R. Co. v. Hendricks*, 41 Ind. 48 ; *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294 ; *Fowlkes v. Nashville, &c. R. R. Co.*, 5 Bart. (Tenn.) 663.

³ *Pittsburgh, &c. R. R. Co. v. Hine*, 25 Ohio St. 629 ; *Rugland v. Anderson*, 30 Minn. 386.

⁴ *Waller v. Chicago*, 11 Ill. App. 209.

⁵ *Meara v. Holbrook*, 20 Ohio St. 127 ; *Lamphear v. Buckingham*, 33 Conn. 257 ; *S. P. Clement v. Canfield*, 28 Vt. 302 ; *Jeffersonville, &c. R. R. Co. v. Downey*, 61 Ind. 287 ; *Tracy v. Troy, &c. R. R. Co.*

38 N. Y. 433 ; *Pittsburgh, &c. R. R. Co. v. Conant*, 61 Ind. 38 ; *Illinois Central R. R. Co. v. Kanouse*, 39 Ill. 272 ; *Cook v. Milwaukee, &c. R. R. Co.* 36 Wis. 45 ; *Stewart v. Chicago, &c. R. R. Co.*, 27 Iowa, 282 ; *Downing v. Chicago, &c. R. R. Co.*, 43 Iowa, 96 ; *Clary v. Iowa, &c. R. R. Co.*, 37 Iowa, 344 ; *East St. Louis, &c. R. R. Co. v. Gibner*, 82 Ill. 632 ; *Burchfield v. Northern Central R. R. Co.*, 57 Barb. (N. Y.) 589 ; *Purdy v. N. Y. & New Haven R. R. Co.*, 61 N. Y. 353 ; *Gardner v. Smith*, 7 Mich. 410 ; *Jones v. Seligman*, 16 Hun (N. Y.), 230.

⁶ *State v. Gilmore*, 24 N. H. 461.

CHAPTER XXVII.

INJURIES TO LIVE STOCK.

SEC. 417. Company not liable for, when.
 418. Contributory Negligence.
 419. Cattle straying upon a Highway.

SEC. 420. Private Crossings, Gates, Bars,
 etc.
 421. Statutory Duty to Fence.
 422. Evidence: Burden of Proof.
 423. Damages.

SEC. 417. *Company not Liable for, when.* — A railway company, at the common law, is under no other or different obligation respecting the premises occupied by it than any other owner or occupant of real estate,¹ and, unless so required by statute, it is under no obligation to fence its track; and as the owner of adjoining lands is bound to restrain his cattle, it is not liable for cattle killed or injured upon its track, simply because it had omitted to erect fences or other barriers to prevent them from getting there;² and, consequently, in such

¹ *Hurd v. Rutland, &c. R. R. Co.*, 25 Vt. 116; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 228; *Munger v. Tona-wanda R. R. Co.*, 4 N. Y. 349.

² *Chapin v. Sullivan R. R. Co.*, 39 N. H. 53; *Hurd v. Rutland, &c. R. R. Co.*, *ante*; *Williams v. Michigan, &c. R. R. Co.*, 2 Mich. 259; *Northeastern R. R. Co. v. Sineath*, 8 Rich. (S. C.) 185; *Alton, &c. R. R. Co. v. Baugh*, 14 Ill. 211; *Perkins v. Eastern R. R. Co.*, 29 Me. 307; *Morse v. Rutland, &c. R. R. Co.*, 27 Vt. 49; *Jackson v. Rutland, &c. R. R. Co.*, 25 Vt. 150; *Vandegrift v. Delaware R. R. Co.*, 2 Houst. (Del.) 287; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *Indianapolis, &c. R. R. Co. v. Harter*, 38 Ind. 557; *Williams v. New Albany, &c. R. R. Co.*, 5 Ind. 111; *Indianapolis, &c. R. R. Co. v. McClure*, 26 Ind. 370; *Indianapolis, &c. R. R. Co. v. Kinney*, 8 Ind. 402; *Stucke v. Milwaukee, &c. R. R. Co.*, 9 Wis. 202; *Henry v. Dubuque, &c. R. R. Co.*, 2 Iowa, 288. In *Hook v. Worcester, &c. R. R. Co.*, 58 N. H. 251, a railway company was held not to be liable

for injuries to stock coming on the track through a gate left open by the land-owner, the company not being at fault. So, in Wisconsin a similar rule was adopted under a similar state of facts. *Richardson v. Chicago, &c. R. R. Co.*, 56 Wis. 347. But where gates or bars are left open by the negligence of the company's servants, or agents, it is liable for injuries to cattle escaping upon its track by reason thereof, even though the cattle do not belong to the owner of the land. Thus, in *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 153, affirmed, 6 Hun (N. Y.), 600, it appeared that the plaintiff's cattle escaped from his enclosure in the night through the plaintiff's fence which had in some way been broken down, and passed through it to the highway, and thence through a gate erected between the highway and the defendant's tracks, but which had been left open by the defendant's servants, and some of them were killed and others injured by one of the defendant's engines run over the road. The court held that where a gate is put in a fence, erected by

cases a railroad company is only liable for injuries to cattle upon its track which result from its negligence.¹ Indeed, where a statutory duty to fence is not imposed upon the company, cattle straying upon the track are trespassers, and the owner of them is liable to the company for any injury to its trains or other property by reason of such trespass.² The right of the company to the exclusive use of its

a railroad company in pursuance of the provisions of the general railroad act, for the convenience of the owners of the adjoining land, and such gate is continually left open by the agents or servants of the company, or by those doing business with it, the fence is not maintained within the true intent and meaning of the statute, and the company is liable for any injury occasioned thereby. And that the mere fact that cattle are found upon the track without evidence of any right or authority from the company does not, of itself, establish negligence on the part of the owner of the cattle.

¹ *Turner v. St. Louis, &c. R. R. Co.*, 76 Mo. 261; *Little Rock, &c. R. R. Co. v. Henson*, 39 Ark. 413; *Orange, &c. R. R. Co. v. Miles*, 76 Va. 773; *Missouri, &c. R. R. Co. v. Wilson*, 28 Kan. 637. The owner of cattle, at the common law, is bound to keep them in. *Baltimore, &c. R. R. Co. v. Lamborn*, 12 Md. 257; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *Vicksburgh, &c. R. R. Co. v. Patton*, 31 Miss. 156; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Vickers v. Pacific R. R. Co.*, 42 Mo. 193; *McPheeters v. Pacific R. R. Co.*, 45 Mo. 22. Cattle are regarded as free commoners in Kansas. *Union Pacific R. R. Co.*, 5 Kan. 168. In Michigan and some other States they may be so by vote of the town. *Williams v. Michigan, &c. R. R. Co.*, 2 Mich. 259; *Ohio, Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Cranston v. Cincinnati, &c. R. R. Co.*, 1 Hardy (Ohio), 193; *Murry v. So. Carolina R. R. Co.*, 10 Rich. (S. C.) 227. And while it is not negligence *per se* for the owners of cattle to permit them to run at large, yet a railway company is not liable for injuries inflicted upon them unless negligence is fairly imputable to it. In *Illinois—Chicago, &c. R. R. Co. v. Cuffman*, 38 Ill. 424; *Toledo, &c. R. R. Co. v. Fergusson*, 42 Ill. 449 — and *Iowa*

— *Alger v. Mississippi, &c. R. R. Co.*, 21 Iowa, 374 — cattle are permitted to run, upon the ground that there is no law against it. See also *Macon, &c. R. R. Co. v. Baher*, 42 Ga. 300; *Macon, &c. R. R. Co. v. Lester*, 30 Ga. 911. In several of the States, however, especially the Eastern States, the common-law rule prevails, and the owner of cattle must restrain them; and the fact that they are at large being *prima facie* evidence that they are so with his permission, is *prima facie* evidence of negligence on his part. *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Den. (N. Y.) 255; *Indianapolis, &c. R. R. Co. v. Harter*, 38 Ind. 557; *Louisville, &c. R. R. Co. v. Milton*, 14 B. Mon. (Ky.) 75; *Perkins v. Eastern R. R. Co.*, 29 Me. 307; *Price v. New Jersey R. R. Co.*, 31 N. J. L. 229; 32 id. 19; *Vandegrift v. Rediker*, 22 N. J. L. 185; *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 101; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428. This was formerly the rule in *Illinois*. *Illinois Central R. R. Co. v. Phelps*, 29 Ill. 447. In some of the States it is held that a railway company, in the absence of negligence, is not liable even though cattle escape upon the track from a well-fenced field. *North Penn. R. R. Co. v. Rehman, ante*.

² *Eames v. Salem, &c. R. R. Co.*, 98 Mass. 560. In *Annapolis, &c. R. R. Co. v. Baldwin*, 60 Md. —, where the company's cars were thrown off the track by a collision with the defendant's ox, which was at the time on the track, through the negligence of the owner, the railway company not being at fault, it was held that the defendant was liable. See also, to the same effect, *Drake v. Pittsburgh, &c. R. R. Co.*, 51 Penn. St. 240; *Housatonic, &c. R. R. Co. v. Knowles*, 30 Conn. 313; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Northeastern R. R. Co. v. Sineath*, 8 Rich. (S. C.) 185; *Sinram v. Pittsburgh, &c. R. R. Co.*, 23 Ind. 244;

grounds and tracks is well established, and is essential to the safety of the operation of its trains and the general conduct of its business; and it is under no obligation to keep up a lookout for cattle trespassing upon its track, so far as the rights of the owners of the cattle are concerned, and is generally held to be liable for injuries to cattle

Hannibal, &c. R. R. Co. v. Kenney, 41 Mo. 272. In the Maryland case cited *ante*, *ROBINSON, J.*, said: "The English decisions in actions of negligence fully sustain, we think, this view. In *Child v. Hearn*, L. R. 9 Exch. 176, the plaintiff, in the employment of a railroad company, was returning from his work along the line upon a trolley propelled by hand, and ran over the defendant's pigs, which had escaped from the defendant's land; the trolley was upset and the plaintiff injured. In an action of damages by the plaintiff against the owner of the pigs, it was held the owner was not liable, because the proof showed that the pigs escaped through a defect in the fence, which belonged to the company, and which it was the duty of the company to keep in repair. The liability of the defendant was not, however, questioned, if the pigs had in fact escaped from his lane through his negligence. So in *Lee v. Riley*, 18 C. B. (N. S.) 722, where the plaintiff's mare strayed into an adjoining close through defect in a fence which it was the duty of the defendant to keep in repair, and while there kicked and injured the plaintiff's horse, it was held the defendant was liable. And in *Powell v. Salisbury*, 2 Y. & J. 391, where the plaintiff's horse escaped into the defendant's close through a defective fence which it was the duty of the defendant to keep in repair, and was killed by the falling of a haystack, it was held, even in such a case as that, the damage was not too remote. And then again, in the still later case of *Lawrence v. Jenkins*, L. R. 8 Q. B. 274, where the plaintiff's cow escaped upon the defendant's land, through a fence which the defendant was bound to keep in repair, and while there ate the leaves of a yew-tree, in consequence of which the cow died, the defendant was held liable for the damage. In all these cases the court held the injury to be the consequence of the defendant's negligence, and such being the case he was liable. The first count pre-

sents quite a different question. It merely alleges that the ox was trespassing upon the road, and does not allege that it was trespassing through the negligence of the defendant. Every one, it is true, is obliged to keep his stock within his enclosures, and if they escape upon the land of another, whether through the negligence of the owner or not, and tread down the grass or destroy the crops, the owner is, in an action of trespass, liable for the damage. The common law, which requires every one to keep his stock within his own bounds at his peril, is the law of this State. But this is not an action of trespass to recover for direct and immediate injuries resulting from an estray. It is an action on the case for consequential damages resulting from the estray. And to entitle the plaintiff, in such an action, to consequential damages, he must allege and prove that the injury was the result of the defendant's negligence. If the ox escaped from his enclosures without the knowledge and without any fault of the defendant, we are of opinion he would not be liable in this action for consequential damages. There can be no reason for extending the rigorous rule of the common law, which holds the owner liable in an action of trespass, whether his cattle escape through negligence or not, to an action on the case by a railroad company seeking to recover consequential damages. It is the privilege of such companies to invade every one's property, and build and construct their road wherever they may see fit, and to do so in this State, without being obliged to erect and maintain fences along the line. Even with the best care cattle will sometimes escape from enclosures, and to hold the owner liable for consequential damages, where the escape is without his fault or negligence, would be to subject every one along the line of a railroad to the peril of being ruined, and ruined too without any fault on his part."

trespassing there only when they result from the reckless or wilful misconduct of its agents, in the operation of its trains, or the conduct of its business.¹ This rule has been held in New York,² Massachusetts,³ Kentucky,⁴ Kansas,⁵ Colorado,⁶ Michigan,⁷ Indiana,⁸ Pennsylvania,⁹ New Jersey,¹⁰ Rhode Island,¹¹ and Wisconsin.¹² But in several States it is held that a railway company is liable for injuries to cattle trespassing upon its tracks, if by the exercise of ordinary care they could have been prevented.¹³ But in these States the plaintiff

¹ *Drake v. Philadelphia, &c. R. R. Co.*, 51 Penn. St. 240; *Tower v. Providence, &c. R. R. Co.*, 2 R. I. 404; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Central Branch R. R. Co. v. Lea*, 20 Kan. 553; *Williams v. Michigan Central R. R. Co.*, 2 Mich. 209; *Price v. New Jersey, &c. R. R. Co.*, 32 N. J. L. 19; *Bennett v. Chicago, &c. R. R. Co.*, 19 Wis. 145; *O'Bannon v. Louisville, &c. R. R. Co.*, 8 Bush (Ky.), 348; *Jeffersonville, &c. R. R. Co. v. Underhill*, 48 Ind. 389.

² *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516; *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428; *Mentges v. New York, &c. R. R. Co.*, 1 Hilt. (N. Y. C. P.) 425; *Clark v. Syracuse, &c. R. R. Co.*, 11 Barb. (N. Y.) 112; *Terry v. N. Y. Central R. R. Co.*, 22 Barb. (N. Y.) 574; *Talmadge v. Rensselaer, &c. R. R. Co.*, 13 Barb. (N. Y.) 493; *Marsh v. N. Y. & Erie R. R. Co.*, 14 Barb. (N. Y.) 364.

³ *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 564; *Maynard v. Boston & Maine R. R. Co.*, 115 Mass. 458. In this State it is held that if cattle—as in this instance a horse—are put into a pasture properly fenced, but escape therefrom into a highway, and thence go upon a railway track at a point at which the corporation is bound to, but has neglected to maintain a cattle-guard, and are killed or injured by a train, the company is not liable unless there was reckless or wanton misconduct on the part of those operating the train. *Darling v. Boston, &c. R. R. Co.*, 121 Mass. 118. But see *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 163; *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665, holding otherwise.

⁴ *Louisville, &c. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *O'Bannon v. Louisville, &c. R. R. Co.*, 8 Bush (Ky.), 348.

⁵ *Central Branch R. R. Co. v. Lea*, 353.

⁶ *Denver, &c. R. R. Co. v. Olsem*, 4 Col. 239.

⁷ *Williams v. Michigan Central R. R. Co.*, 2 Mich. 259.

⁸ *Jeffersonville, &c. R. R. Co. v. Ballard*, 48 Ind. 389; *New Albany, &c. R. R. Co. v. McNamara*, 11 Ind. 543; *Jeffersonville, &c. R. R. Co. v. Huber*, 42 Ind. 173; *Michigan Southern R. R. Co. v. Fisher*, 27 Ind. 96.

⁹ *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 101.

¹⁰ *Price v. New Jersey, &c. R. R. Co.*, 32 N. J. L. 19; *Vandegrift v. Rediker*, 21 N. J. L. 185.

¹¹ *Tower v. Providence, &c. R. R. Co.*, 2 R. I. 404.

¹² *Fisher v. Farmers' Loan, &c. Co.*, 21 Wis. 73; *Pritchard v. La Crosse, &c. R. R. Co.*, 7 Wis. 232; *Chicago, &c. R. R. Co.*, 17 Wis. 428.

¹³ *Fossier v. Morgan's Louisiana, &c. R. R. Co.*, 1 McGloin (La.), 349; *Louisville, &c. R. R. Co. v. Wainscott*, 3 Bush (Ky.), 149; *Kentucky Central R. R. Co. v. Lehua*, 14 B. Mon. (Ky.) 518; *Louisville, &c. R. R. Co. v. Milton*, 14 B. Mon. (Ky.) 75. Where cattle are at large without the fault of the owner, and go upon the track of a railroad, and are there killed through the negligence of the railroad company in the management of their train, the owner is not precluded from the right to recover damages by the fact that the cattle were trespassers on the railroad. *Isbell v. N. Y. & New Haven R. R. Co.*, 27 Conn. 393; *Trow v. Vt. Central R. R. Co.*, 24 Vt. 487; *Jackson v. Rutland, &c.*

cannot recover without proof of negligence on the part of the company,¹ and negligence cannot be inferred from the mere fact of kill-

R. R. Co., 25 Vt. 150; *Needham v. San Francisco, &c. R. R. Co.*, 37 Cal. 409; *Witherell v. Milwaukee, &c. R. R. Co.*, 24 Minn. 410; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *Baltimore, &c. R. R. Co. v. Mulligan*, 45 Md. 486; *Cincinnati, &c. R. R. Co. v. Smith*, 22 Ohio St. 227; *Kerwhacker v. Cleveland, &c. R. R. Co.*, 3 Ohio St. 172; *Cincinnati, &c. R. R. Co. v. Waterson*, 4 Ohio St. 424; *Indianapolis, &c. R. R. Co. v. Caldwell*, 9 Ind. 397; *Pittsburgh, &c. R. R. Co. v. Stuart*, 71 Ind. 500; *Nashville, &c. R. R. Co. v. Anthony*, 1 Lea (Tenn.), 516; *Illinois Central R. R. Co. v. Middleworth*, 46 Ill. 494; *Toledo, &c. R. R. Co. v. McGinnis*, 71 Ill. 346; *Peoria, &c. R. R. Co. v. Dugan*, 10 Brad. (Ill.) 233. It is held in these States to be the duty of an engine-driver to keep a constant and careful lookout for stock upon the track; and although stock be wrongfully there, yet he must use ordinary care and diligence to discover it and avoid injury to it, or the company will be liable for the injury done to it. *Little Rock, &c. R. R. Co. v. Finley*, 37 Ark. 562. But it is not always necessary that the engine-driver should stop the train or slacken its speed, on discovering stock on the track. Ordinary prudence requires him to promptly endeavor to drive them off by sounding the whistle, but does not require him to stop, or slacken the speed of the train, when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger. *Little Rock, &c. R. R. Co. v. Trotter*, 37 Ark. 593. The operation of a train with the engine behind it was held not to be negligent where a man was stationed on the front end to keep watch, and the train was moved slowly. *Falconer v. European & North American R. R. Co.*, 1 Pugsley (N. B.), 179. Where the distance to which the light was thrown by the head-light, which was in proper order

and of the best kind in use, is not shown, but only that the engineer could not perceive by its light, at thirty yards distance, a young mule of the color of the earth about a culvert in which it was fastened, and could not stop in forty yards distance, and there is no evidence as to how much of the mule was above the track, it is error to charge the jury that it was negligence to run the train at a rate of speed at which the engine-driver could not stop before reaching the mule after seeing it was on the track. Whether or not this was negligence was a question for the jury, in view of all the facts, under appropriate instructions from the court. *Memphis, &c. R. R. Co. v. Lyon*, 62 Ala. 71. Imperfect light and fog at the time of killing stock by a railroad train are circumstances that the jury may take into consideration in determining negligence. *St. Louis, &c. R. R. Co. v. Vincent*, 36 Ark. 451. The fact that the person in charge of the defendant's locomotive was a fireman, not a skilled engine-driver, is entirely immaterial in an action where the evidence shows the collision was not occasioned by any lack of skill on his part. *Culhane v. N. Y. Central, &c. R. R. Co.*, 60 N. Y. 133. It is the duty of a railway company to provide a sufficient number of brakes upon a train to stop it within a reasonable time and distance, and a failure to do so is negligence. *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454. In the absence of any statute limiting the rate of speed of railway trains, no conceivable rate is evidence of negligence *per se*. *McKonkey v. Chicago, &c. R. R. Co.*, 40 Iowa, 205. But it has been held to be negligence in a railway company to run its trains on a straight track in the night-time, at such a rate of speed that the train cannot be stopped in the distance at which the engine-driver can see cattle or other obstructions on the track by the aid of the head-light. *Memphis, &c. R. R. Co. v. Lyon*,

¹ *Cincinnati, &c. R. R. v. Co. Bartlett*, 58 Ind. 572; *Turner v. St. Louis, &c. R. R. Co.*, 76 Mo. 261; *Railroad Co. v.*

McMillan, 37 Ohio St. 554; *Railroad Co. v. Heiskell*, 38 Ohio St. 666.

ing.¹ It is not necessary that the killing should be shown to have been wantonly or wilfully done,² but it must appear that it was negligently done, which may be established by showing that the engine-driver did not use proper precautions to avoid accident.³ Thus, when animals are standing on the track of a railway, and can be seen by the persons running the train by the use of ordinary care, it is their duty to slacken speed or stop the train, if necessary, to avoid injuring them.⁴ The engine-driver in charge of a running train

62 Ala. 71. So a railway company is liable for damage resulting from injury or killing of stock by its train on the railway track, when the train is moving at a greater rate of speed than allowed by law. *Houston, &c. R. R. Co. v. Terry*, 42 Tex. 451. But a railway company is not authorized to diminish the speed of a train for the sake of avoiding injury to stock, if by so doing it augments the danger to passengers. There is no such thing as a *reasonable* increase of danger to passengers. *Sandham v. Chicago, &c. R. R. Co.*, 38 Iowa, 88. The rate of speed and the absence of signals may be shown as establishing negligence in the operation of the train. *Edson v. Central R. R. Co.*, 40 Iowa, 47. The rate of speed should depend upon the circumstances and locality. *Peoria, &c. R. R. Co. v. Miller*, 11 Brad. (Ill.) 875. In a Tennessee case it was held error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the road, the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light. *Louisville, &c. R. R. Co. v. Milam*, 9 Lea (Tenn.), 223. An owner may recover for his stock killed while running at large, if they were so at large without his fault. *Railway Co. v. Howard*, 11 Am. & Eng. R. R. Cas. (Ohio) 488. And contributory negligence is not chargeable to the owner in letting the stock run at large, when it breaks out of its

pasture without his fault. *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83. But where the evidence showed that the plaintiff's animal had strayed upon the defendant's track, and, despite the slackening of the speed of the train and the sounding of the whistle, the animal, instead of stepping off the track, had run ahead of the train until it had jumped into a bridge on the track and broken its leg, it was held that the defendant was not liable. In this case there was no evidence of any order of the board of commissioners directing that animals might be permitted to run at large. *Pittsburgh, &c. R. R. Co. v. Stuart*, 71 Ind. 500. The fact that the cattle injured were permitted to run at large will not shield the company from the consequences of the failure of its agents to observe proper care and vigilance. *Kentucky Central R. R. Co. v. Lebus*, 14 Bush (Ky.), 518. The permission of stock to run at large is not such negligence on the part of the owner as will defeat his action against a railway company for negligently killing the same. *Washington v. Baltimore, &c. R. R. Co.*, 17 W. Va. 190; *Kuhn v. Chicago, &c. R. R. Co.*, 42 Iowa, 420; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595. If a person suffers his stock to run loose in a field through which an unfenced railroad track passes, he can only require such company to exercise ordinary care and prudence in respect to protection for such stock. *Peoria, &c. R. R. Co. v. Dugan*, 10 Brad. (Ill.) 233.

¹ *McKissock v. St. Louis, &c. R. R. Co.*, 73 Mo. 456.

² *Shuman v. Indianapolis, &c. R. R. Co.*, 11 Brad. (Ill.) 472.

³ *Trout v. Virginia, &c. R. R. Co.*, 23 Gratt. (Va.) 619.

⁴ *Shuman v. Indianapolis, &c. R. R. Co.*, 11 Brad. (Ill.) 472; *Rockford, &c.*

should always be on the lookout for obstructions, and when an obstruction is discovered, no matter when or where, should promptly resort to all means within his power, known to skilful engine-drivers, to avert the threatened injury or danger.¹

The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employes neglected those precautions which ordinary prudence suggests as necessary to avoid casualties.² To run a train composed of six or eight cars without a brakeman is gross negligence; and where such a train is in motion, and there is apparent danger, such as to induce the engine-driver to whistle for putting on the brakes, and there is a brakeman on the train, and he fails to apply the brakes, this implies gross negligence.³ But a railway company is not chargeable with negligence in injuring live stock on its track, unless it be shown that, after the stock was discovered, the company could, without imperilling the persons or property intrusted to it for transportation, have avoided the injury. Failure to ring the bell or sound the whistle does not constitute negligence *per se*; there must appear to be some necessary connection between the failure and the injury.⁴

SEC. 418. Contributory Negligence. — Where the owner of cattle is guilty of negligence which proximately contributes to the injury

R. R. Co. v. Rafferty, 73 Ill. 53; Paris, &c. R. R. Co. v. Mullins, 66 id. 526; South, &c. R. R. Co. v. Jones, 56 Ala. 507; Missouri Pacific R. R. Co. v. Wilson, 28 Kan. 637. But in some of the States it is held that the company is under no obligation to stop or even slacken the speed of its trains, where cattle are unlawfully on the track. Durham v. Wilmington, &c. R. R. Co., 82 N. C. 252; Central Ohio R. R. Co. v. Lawrence, 13 Ohio St. 66; Bemis v. Conn. & Pass. River R. R. Co., 42 Vt. 375; Raiford v. Mississippi, &c. R. R. Co., 43 Miss. 233; Price v. New Jersey, &c. R. R. Co., 31 N. J. L. 229; Locke v. St. Paul, &c. R. R. Co., 15 Minn. 350; New Orleans, &c. R. R. Co. v. Field, 46 Miss. 573.

¹ South, &c. R. R. Co. v. Williams, 65 Ala. 74.

² South & North Alabama R. R. Co. v. Thompson, 62 Ala. 594.

³ Toledo, &c. R. R. Co. v. McGinnis, 71 Ill. 346.

⁴ Wallace v. St. Louis, &c. R. R. Co.,

74 Mo. 594. In some of the States the courts hold that speed and punctuality in the running of trains, as well as the safety of passengers, are paramount considerations to which private interests must yield; and that to compel a railway company to slacken the speed of its trains, or stop them, whenever an animal is seen upon the track, would impose a burden upon them which would destroy all calculations as to the arrival of trains, etc., and compel them often to choose between pecuniary loss and injuries to their passengers, which would be unwise and unjust. Maynard v. Boston, &c. R. R. Co., 115 Mass. 458; Louisville, &c. R. R. Co. v. Ballard, 2 Met. (Ky.) 177; Needham v. San Francisco, &c. R. R. Co., 37 Cal. 409. But where the statute has prescribed the rate of speed at which trains may run, if it is running in excess of that rate, it is held liable for injuries inflicted while so running. Maher v. Atlantic, &c. R. R. Co., 64 Mo. 267, and even where the statute has prescribed no rate.

or killing of his cattle upon a railway, he cannot recover therefor;¹ and the question as to whether he was guilty of such contributory negligence is generally one of fact to be determined by the jury in view of the circumstances; and especially is this the case when the question is open to doubt or debate.² If a person wantonly or carelessly drives stock upon the track of a railroad, he is guilty of contributory negligence; and if the stock is injured, he cannot recover.³ But where cattle escape from their owner's land upon an adjoining railway and are killed by an engine, the mere fact that the owner turned them upon his land where there was no fence between it and the railway, when it was the legal duty of the company to build it, is not proof of contributive negligence on his part.⁴ But if a horse

¹ *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454; *Indianapolis, &c. R. R. Co. v. Caudle*, 60 Ind. 112; *Toledo, &c. R. R. Co. v. Head*, 62 Ill. 233; *Jeffersonville, &c. R. R. Co. v. Adams*, 43 Ind. 402; *Cincinnati, &c. R. R. Co. v. Street*, 50 Ind. 225; *Williams v. Northern Pacific R. R. Co.*, 11 Am. & Eng. R. R. Cas. (Dak.) 421.

² *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665; *Evans v. St. Paul, &c. R. R. Co.*, 30 Minn. 489; *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450; *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360.

³ *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454.

⁴ *Wilder v. Maine Central R. R. Co.*, 65 Me. 332. In several of the States the common-law rule, which requires the owner of cattle to keep them upon his own land, does not prevail. *Burgwyn v. Whitfield*, 81 N. C. 261; *Studwell v. Ritch*, 14 Conn. 292; *Russell v. Hanley*, 20 Iowa, 219; *Stoner v. Shugart*, 45 Ill. 76; *Headen v. Rust*, 39 Ill. 186; *Seeley v. Peters*, 10 Ill. 130. And the mere fact that he permits them to stray from his land does not release the company from its obligation to use ordinary care. *Chicago, &c. R. R. Co. v. Engle*, 84 Ill. 397; *Toledo, &c. R. R. Co. v. Deacon*, 63 Ill. 91; *Rockford, &c. R. R. Co. v. Rafferty*, 73 Ill. 58; *Toledo, &c. R. R. Co. v. Ingraham*, 58 Ill. 120; *Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Cincinnati, &c. R. R. Co. v. Smith*, 22 Ohio St. 227; *Laws v. North Carolina R. R. Co.*, 7 Jones (N. C.), 468;

Alger v. Mississippi, &c. R. R. Co., 10 Iowa, 268; *Kuhn v. Chicago, &c. R. R. Co.*, 42 Iowa, 420; *Smith v. Chicago, &c. R. R. Co.*, 34 Iowa, 506; *Evans v. Burlington, &c. R. R. Co.*, 21 Iowa, 374; *Balcom v. Dubuque, &c. R. R. Co.*, 21 Iowa, 102; *Whitbeck v. Dubuque, &c. R. R. Co.*, 21 Iowa, 103; *Marietta, &c. R. R. Co. v. Stevenson*, 24 Ohio St. 48; *Coyle v. Baltimore, &c. R. R. Co.*, 11 W. Va. 94; *Baylor v. Baltimore, &c. R. R. Co.*, 9 W. Va. 270; *Georgia, &c. R. R. Co. v. Neeley*, 56 Ga. 540; *Vicksburgh, &c. R. R. Co. v. Patton*, 31 Miss. 156; *Raiford v. Mississippi, &c. R. R. Co.*, 43 Miss. 233; *Mississippi, &c. R. R. Co. v. Miller*, 40 Miss. 45; *Tarewater v. Hannibal, &c. R. R. Co.*, 42 Mo. 193; *McPheeters v. Hannibal, &c. R. R. Co.*, 45 Mo. 22; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Hannibal, &c. R. R. Co. v. Kenney*, 41 Mo. 271. If the owner of cattle knowingly permits them to run at large in the vicinity of a railway, where it is not required by law to be fenced, and they stray upon the track and are killed, it not appearing that the killing is wilfully done, the company will not be liable, although the owner may not have known that the railway was completed. *Jeffersonville, &c. R. R. Co. v. Adams*, 43 Ind. 402. But it is not conclusive evidence of contributory negligence to allow cattle to run at large in a pasture next to a railway where the railway fence is out of repair. *Evans v. St. Paul & Sioux City R. R. Co.*, 30 Minn. 489. And whether, in exercising his right to use his land, the land-owner has been guilty of negligence

escapes from the control of the owner's agent through his negligence, and, after running six hundred and fifty feet, enters upon the tracks

contributing to an injury to his cattle, is ordinarily a question of fact for a jury, to be determined with reference to all the circumstances of the case. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is not such negligence on the part of the land-owner, in law, notwithstanding the company's road is unfenced, and notwithstanding there is another railroad within a few hundred feet. *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360. Thus, in an Iowa case, it was held that the question whether or not the owner of a blind horse was guilty of negligence in turning out the horse to graze where he might be exposed to danger from passing railroad trains was properly submitted to the jury. *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450. In a Wisconsin case the plaintiff, living about three-fourths of a mile from defendant's line, which he knew to be unfenced, permitted his cow to pasture in summer on a large tract of unenclosed land, extending from the neighborhood of his residence to the track; and she passed upon the track and was injured. It was held that upon these facts the question of contributory negligence, being open to doubt and debate, was for the jury. *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665. The court cannot say to the jury, as a matter of law, that permitting cattle to run at large is negligence which contributed to their injury, as it depends upon all the circumstances whether it was negligence and whether it contributed to the injury. *Cincinnati, &c. R. R. Co. v. Ducharme*, 4 Brad. (Ill.) 178. Where a railway company fails to fence its road, and stock is killed by its trains in a county where it is lawful for stock to run at large, the question of contributory negligence, in the owner permitting his stock to run at large, cannot arise. *Ohio & Mississippi R. R. Co. v. Fowler*, 85 Ill. 21. And where cattle are killed by a locomotive on a railroad running along unenclosed lands, but not at a railroad crossing, the fact that the cattle got upon the track from land adjoining that of the owner of the cattle, and upon which they had strayed, is no

defence to an action for damages against the railroad. *Kaes v. Mo. Pacific R. R. Co.*, 6 Mo. App. 397. The owner of animals, in allowing them to be at large on the range of unenclosed lands, is not chargeable with an unlawful act or an omission of ordinary care in keeping his stock, subject to the qualification, however, that animals which are unruly or dangerous are required to be restrained. The bare fact that the railway is unfenced will not render it liable for killing stock. *Blaine v. Chesapeake, &c. R. R. Co.*, 9 W. Va. 252. But if an animal is allowed to run at large in the vicinity of a railroad at a point where it was not fenced, and could not legally be fenced, the owner cannot recover for its injury. *Cincinnati, &c. R. R. Co. v. Street*, 50 Ind. 225. So, where cattle are running at large in an extra-hazardous place near a railway, the railway company is only liable for wanton and reckless neglect in their injury. *Williams v. Northern Pacific R. R. Co.*, 11 Am. & Eng. R. R. Cas. (Dak.) 421. In Nebraska, under the statute, a railway company is liable for stock killed upon its track while running at large in the nighttime at a point where the company was required, but failed, to fence its track, notwithstanding stock is prohibited by statute from running at large in the night-time. *Burlington, &c. R. R. Co. v. Brinkman*, 14 Neb. 70. But in Iowa a railway company is released from the duty of exercising ordinary care toward animals required to be kept in an enclosure, which may have strayed upon its track, only when the animal is at large by the sufferance of the owner. *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497. But, generally, where it appears that the injured stock was permitted to run at large in violation of law, the question whether the owner of the stock has been guilty of contributory negligence is one of fact, to be determined by the jury from the circumstances of the case. *Ewing v. Chicago, &c. R. R. Co.*, 72 Ill. 25; *Rockford, &c. R. R. Co. v. Irish*, 72 Ill. 404. The better rule seems to be, where a railway company is not guilty of negligence in failing to protect its

of a railway company at a point where there are no barriers, and after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might, in their judgment, fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover.¹ Where, however, a person's cattle get upon a railway track without fault on his part,² as, if they escape from a well-fenced field³ or from the custody of the owner or his servant without fault on their part while driving them along a highway, he is not precluded from a recovery if they are injured or killed by the negligence of a railway company on whose track they escaped. Indeed, the negligence of a party must be the immediate, proximate cause of an injury, to render him liable therefor; and the same rule applies to the contributory negligence which would relieve him from liability. An instruction which stated that the negligence of the plaintiff must have contributed "directly" to the injury, to excuse the defendant, was held to come within the rule.⁴ In an action

track from swine, in a township where they are not permitted to run at large, and it appears that an animal is killed by the negligence of the railroad company, and that the negligence of the owner in permitting the animal to run at large, in violation of the statute, contributed directly to the injury, that the negligence of the defendant is offset by the negligence of the plaintiff, and the owner of the animal cannot recover. *Kansas City, &c. R. R. Co. v. McHenry*, 24 Kan. 501. If domestic animals are on the track of a railroad by the fault of the owner, the owner takes all reasonable risks of injury to them from passing trains; and while the railroad company is not bound to presume that such animals will be upon the track, they are not authorized to injure them wilfully or carelessly, but are bound to use reasonable care to avoid injuring them. But considering the relative value and importance of a train, and of the lives of the persons upon it, as compared with the value of domestic animals, a proper regard for both train and cattle would make the duty to avoid injury to the train, and to those upon it, primary and paramount to the duty of avoiding injury to the cattle. *Witherell v. Milwaukee, &c. R. R. Co.*, 24

Minn. 410; *O'Connor v. Chicago, &c. R. R. Co.*, 27 Minn. 166. In Pennsylvania it is held that a railway company is not liable for injuries to cattle straying upon its track, unless it is wantonly or wilfully inflicted. *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Drake v. Phila. &c. R. R. Co.*, 51 Penn. St. 240.

¹ *Amstein v. Gardner*, 134 Mass. 4.

² *Trout v. Virginia, &c. R. R. Co.*, 23 Gratt. (Va.) 619.

³ *Somner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Toledo, &c. R. R. Co. v. Milligan*, 52 Ind. 506; *Chicago, &c. R. R. Co. v. Harris*, 54 Ill. 428; *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83; *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497; *Bulkley v. N. Y. & New Haven R. R. Co.*, 27 Conn. 479; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428.

⁴ *Gates v. Burlington, &c. R. R. Co.*, 39 Iowa, 45; *Towne v. Nashua, &c. R. R. Co.*, 124 Mass. 110; *White v. Concord R. R. Co.*, 30 N. H. 188; *Housatonic R. R. Co. v. Waterbury*, 23 Conn. 101; *Horn v. Atlantic, &c. R. R. Co.*, 35 N. H. 169. Indeed, in those States in which the common-law rule as to the owner's duty to restrain cattle prevails, cattle which are at large upon a highway are treated as

against a railway company for damages for loss caused by the latter's negligence, an instruction to the effect that the plaintiff could recover, if he showed by a preponderance of evidence that the loss resulted from the negligence of the defendant, was held defective in failing to instruct the jury that the plaintiff could not recover if his own negligence contributed to the loss.¹ In an action for the value of the plaintiff's horse, which escaped upon the defendant's railway from an adjoining field and was killed by a train, in consequence of a defect in the defendant's fence at that place, it was held that if it had appeared that the horse was breachy, and accustomed to jump or break lawful fences, and that the plaintiff, knowing these facts, turned him loose in the field adjoining the track, the jury might have found upon this evidence that the plaintiff was guilty of contributory negligence, though the court could not so hold as a matter of law.² It is held in some of the cases not to be conclusive evidence of negligence for the owner of cattle knowingly to permit them to run at large in a pasture next to a railroad track, where the fence is out of repair,³ and that whether it is or not is a question of

trespassers, and their owners as wrongdoers; and if they stray upon the track at a point where the company is not bound to fence, the latter is not liable unless the injury is inflicted by gross negligence, which may be said to be wilful. *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 164; *Halloran v. N. Y. & Harlem R. R. Co.*, 2 E. D. S. (N. Y. C. P.) 257; *Fitch v. Buffalo, &c. R. R. Co.*, 13 Hun (N. Y.), 668; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Bowman v. Troy, &c. R. R. Co.*, 87 Barb. (N. Y.) 516; *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428. But holding the company liable for mere negligence, see *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Indianapolis, &c. R. R. Co. v. McKinney*, 24 Ind. 283; *Chicago, &c. R. R. Co. v. Morrow*, 67 Ill. 218; *Springfield, &c. R. R. Co. v. Andrew*, 68 Ill. 57.

¹ *McCormick v. Chicago, Rock Island & Pacific R. R. Co.*, 47 Iowa, 345.

² *Jones v. Sheboygan, &c. R. R. Co.*, 42 Wis. 306.

³ *Evans v. St. Paul R. R. Co.*, 30 Minn. 489; *Ohio, &c. R. R. Co. v. Fowler*, 85 Ill. 21; *St. Louis, &c. R. R. Co. v. Ladd*, 36 Ill. 409; *Toledo, &c. R. R. Co. v. Ferguson*, 42 Ill. 449; *Corwin v.*

N. Y. & Erie R. R. Co., 13 N. Y. 42; *Brady v. Rensselaer R. R. Co.*, 1 Hun (N. Y.), 378. In this case, a cow was left in charge of a boy who drove her upon an unenclosed lot near the defendant's track, and left her for a short time, and she strayed upon the track and was killed by a train. It was held that the plaintiff was entitled to recover. *MILLER, P. J.*, said: "In *Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516, it was held that where one suffered his cow to be at large in a public street, and on the track of a railroad in a city, apparently alone and unattended, with no one to take charge of her, and where it did not appear that she was in the vicinity of the plaintiff's residence, or had been previously taken care of by him, or had escaped without his fault, or was lawfully travelling along the street, that he could not recover for injuries to the cow, happening through the negligence of the railroad company. This was an extreme case, and differs essentially from the case at bar, for here the cow was kept and fed in the plaintiff's stable, and only allowed to go out in charge of a boy employed for that purpose, and then not very far from the plaintiff's residence. The plaintiff had taken every precaution to

fact for the jury, in view of the circumstances.¹ But where the company is not in default as to the erection and repair of the fence,

guard against danger or accident, and it was the absence of the boy, without the knowledge or consent of the plaintiff, which enabled the cow to stray upon the defendant's track, where she was killed. There is a class of cases which holds that where the defendant was in default, the negligence of the owner in permitting the animal to run at large in the highway, or to trespass upon the premises of a neighbor, is not a defence. *Munch v. N. Y. Central R. R. Co.*, 29 Barb. (N. Y.) 647; *Suydam v. Moore*, 8 Barb. (N. Y.) 358. I am inclined to think that the judgment may be upheld within the principle here laid down, and that the temporary absence of the boy in charge of the cow was no defence. Even if it may properly be urged that there was a question of plaintiff's negligence in the case, I am not prepared to say that it was not for the jury to determine, under all the circumstances, whether there was negligence. But, independent of these considerations, I think that the case may properly be disposed of upon another ground. The defendant was bound to erect and maintain fences, and to construct and maintain cattle-guards at their crossing, near which the cow was run over. This had been done, but when the accident occurred the fence was temporarily removed, for the purpose of repairing the track, and there was evidence to show that the cattle-guard at the crossing was defective and insufficient, so that cattle could walk over the same. The defendant was clearly liable within the principle laid down in *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 49, by DENIO, J., that the design of the section was to require the railroad company to enclose their tracks with substantial fences, and to guard them by ditches called cattle-guards, and that one method provided for securing that object was the provision charging the companies which had disregarded the statute with damages for all injuries done to animals, and that it was not material from whence, or under what circumstances, the animals came upon the track, provided they were enabled to get there by the absence of cattle-guards. As was said in

Bradley v. N. Y. & Erie R. R. Co., 34 N. Y. 432, 'It is no excuse that the cattle, horses, etc., were at large in violation of law.' The exceptions to this general rule are, where it appears that the plaintiff drove his cattle on the road and left them there, or did some positive act increasing the danger of his cattle, or in a case where a party voluntarily permits his cattle to stray upon the railroad track. *Corwin v. N. Y. & Erie R. R. Co.*, *ante*; *Poler v. N. Y. Central R. R. Co.*, 16 N. Y. 480. As the case stood, there was no question of contributory negligence to submit to the jury; for even if the plaintiff had known of the defects of fence or cattle-guards, it would have been no defence." *Shepard v. N. Y. & Erie R. R. Co.*, 35 N. Y. 644; *Louisville, &c. R. R. Co. v. Whitrell*, 68 Ind. 297; *Knight v. Toledo, &c. R. R. Co.*, 24 Ind. 402; *Jeffersonville, &c. R. R. Co. v. Dunlap*, 29 Ind. 426; *Louisville, &c. R. R. Co. v. Cahill*, 63 Ind. 340; *Toledo, &c. R. R. Co. v. Cary*, 37 Ind. 172; *McCoy v. California, &c. R. R. Co.*, 40 Cal. 532; *Rogers v. Newburyport R. R. Co.*, 1 Allen (Mass.), 16; *Wilder v. Maine Central R. R. Co.*, 65 Me. 332. But see *Dayton, &c. R. R. Co. v. Miami County Infirmary*, 32 Ohio St. 566.

¹ *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360; *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450; *Estes v. Atlantic, &c. R. R. Co.*, 63 Me. 308; *Rockford, &c. R. R. Co. v. Irish*, 72 Ill. 404; *Pitzner v. Shinnick*, 39 Wis. 120; *Cairo, &c. R. R. Co. v. Woolsey*, 85 Ill. 370; *Curry v. Chicago, &c. R. R. Co.*, 48 Wis. 665; *Cincinnati, &c. R. R. Co. v. Ducharme*, 4 Brad. (Ill.) 178. So, too, the question whether or not the company was guilty of negligence in killing the cattle is one of fact to be found by the jury. *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497. In *Bulkley v. N. Y. & New Haven R. R. Co.*, 27 Conn. 479, the plaintiff had driven his cows home after dark in the evening, and left them in the highway in front of his house, intending to milk them there, and then put them into his enclosure, and while they were so left went into his house for a short time.

the contributory negligence of the plaintiff will defeat a recovery.¹ Every person is bound to use ordinary care to save his property from injury or destruction, and not having done so he cannot saddle upon another a loss resulting to it.²

SEC. 419. *Cattle straying upon a Highway.*—Nor, if a railway company has discharged its duty as to the erection of cattle-guards is it liable for injuries to cattle escaping upon its track from highways, when they have been turned into the highway by the owner, to graze or for other purposes, unless the injury is wilfully or wantonly inflicted;³ or, as held in some of the States, unless the injuries resulted from the negligence of the company.⁴ Depot-grounds, as a rule, cannot be fenced, at least without great inconvenience to the company and the public, and generally are not required to be; and where cattle straying upon the highway escape upon the track over such grounds, or at any point where the company is not required to erect a fence, it can only be held responsible for injuries wilfully inflicted;⁵ and the same is also true where it is impossible to fence

While he was gone they strayed away, and he searched for them until eleven o'clock at night. About ten o'clock at night they were run over by the defendants' cars. The railroad was about a mile from the plaintiff's house, and he had not searched in that direction. The suffering of cattle to run at large was forbidden by statute. The judge charged the jury that the plaintiff had a right to place his cows in the highway for the temporary purpose of milking them, and that if he left them there intending to milk them within a reasonable time and then to put them into his enclosure, and exercised ordinary care for the purpose of keeping them, he was not to be regarded as having suffered them to go at large within the meaning of the statute, and was not guilty of such negligence as would prevent his recovery. It was held, on motion of the defendants for a new trial, that the question of negligence was properly one of fact for the jury, but that, so far as it could be treated as involving any legal question, the law was properly stated in the charge. *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83; *Bennett v. Chicago, &c. R. R. Co.*, 19 Wis. 145; *Peoria, &c. R. R. Co. v. Champ*, 75 Ill. 577; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428.

¹ *Jeffersonville, &c. R. R. Co. v. Foster*, 63 Ind. 342; *Toledo, &c. R. R. Co. v. Thomas*, 18 Ind. 215; *Illinois Central R. R. Co. v. Goodwin*, 30 Ill. 117; *Ohio, &c. R. R. Co. v. Eaves*, 42 Ill. 288; *Flint, &c. R. R. Co. v. Lull*, 28 Mich. 510; *Fisher v. Farmers' Loan & Trust Co.*, 21 Wis. 73; *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665.

² *Illinois Central R. R. Co. v. Finnigan*, 21 Ill. 646; *Finch v. Central R. R. Co.*, 42 Iowa, 304; *Downing v. Chicago, &c. R. R. Co.*, 43 Iowa, 96.

³ *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428; *Darling v. Boston, &c. R. R. Co.*, 121 Mass. 118; *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 564; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349.

⁴ *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Indianapolis, &c. R. R. Co. v. McKinney*, 24 Ind. 283; *Springfield, &c. R. R. Co. v. Andrew*, 67 Ill. 218.

⁵ *Indianapolis, &c. R. R. Co. v. Oestel*, 20 Ind. 231; *Indianapolis, &c. R. R. Co. v. Crandall*, 58 Ind. 365; *Jeffersonville, &c. R. R. Co. v. Beatty*, 36 Ind. 15; *Pittsburgh, &c. R. R. Co. v. Bowyer*, 45 Ind. 496; *Flint, &c. R. R. Co. v. Lull*, 28 Mich. 510; *Blair v. Milwaukee, &c. R. R. Co.*, 20 Wis. 254; *Swearingen v. Missouri, &c. R. R. Co.*, 64 Mo. 73; *Morris v. St.*

both sides of the track,¹ or where a fence would interfere with the business of an adjacent owner. Thus, where a fence would interfere with a hay-press and saw-mill on adjoining lands, it was held that the company was not bound to erect a fence.² Where there is a natural obstacle, as a high bluff, hedge, ditch, etc., which furnishes an as effectual security as a fence prescribed by statute, it is treated as a lawful fence.³ Where a railway company is required to fence its road, it is its duty to fence both sides of it;⁴ and while it cannot be required to fence its road where it crosses a highway merely,⁵ yet, even though there is no special provision of the statute to that effect, where it is required to keep its road "properly fenced," it is bound to construct suitable cattle-guards at all highway crossings, to

Louis, &c. R. R. Co., 58 Mo. 78; Durand v. Chicago, &c. R. R. Co., 26 Iowa, 559; Comstock v. Des Moines Valley R. R. Co., 32 Iowa, 376; Cole v. Chicago, &c. R. R. Co., 38 Iowa, 311; Munger v. Tonawanda R. R. Co., 4 N. Y. 349; Toledo, &c. R. R. Co. v. Chapin, 66 Ill. 504; Indianapolis, &c. R. R. Co. v. Christy, 43 Ind. 143; Chicago, &c. R. R. Co. v. Campbell, 47 Mich. 265; Robertson v. Atlantic, &c. R. R. Co., 64 Mo. 412; Flattes v. Chicago, &c. R. R. Co., 35 Iowa, 191; Cleveland v. Chicago, &c. R. R. Co., 35 Iowa, 220; Kyser v. Kansas City, &c. R. R. Co., 56 Iowa, 207; Latty v. Burlington, &c. R. R. Co., 38 Iowa, 250. But in Iowa, under a statute prohibiting the running of trains upon depot-grounds at a greater rate of speed than eight miles an hour, it is held that the company is liable for cattle killed there when the train is running at a higher rate of speed. Monahan v. Keokuk, &c. R. R. Co., 45 Iowa, 523. But this statute has no application outside the depot-grounds. The burden of showing that the train was running at a rate of speed greater than that fixed by statute is upon the plaintiff. Plaster v. Illinois Central R. R. Co., 35 Iowa, 549. In Missouri a railway company is not liable for injuries to stock which escapes upon its track within the corporate limits of a city and near its depots, unless it is shown to be guilty of negligence. Wallace v. St. Louis, &c. R. R. Co., 74 Mo. 594. But this is only the rule where it is necessary to keep the road open in order to transact the business of the company. Morris v. St. Louis, &c.

R. R. Co., 58 Mo. 78; Swearingen v. Missouri, &c. R. R. Co., 64 Mo. 73; and this is the rule generally held. Wabash, &c. R. R. Co. v. Forabee, 77 Ind. 158; Pittsburgh, &c. R. R. Co. v. Laufman, 78 Ind. 319; and it may be shown that after the accident the company built a fence at the point where the cattle got upon the track, for the purpose of showing that they regarded a fence as necessary at that point. Toledo, &c. R. R. Co. v. Owen, 43 Ind. 405.

¹ Indiana, &c. R. R. Co. v. Leak, 89 Ind. 596.

² Ohio, &c. R. R. Co. v. Rowland, 50 Ind. 349; 51 id. 285; Pittsburgh, &c. R. R. Co. v. Bowyer, *ante*; Indianapolis, &c. R. R. Co. v. Kinney, 8 Ind. 402.

³ Hilliard v. Chicago, &c. R. R. Co., 87 Iowa, 442.

⁴ Tredway v. Sioux City, &c. R. R. Co., 43 Iowa, 527.

⁵ Flint, &c. R. R. Co. v. Lull, 28 Mich. 510; Indianapolis, &c. R. R. Co. v. Parker, 29 Ind. 471; Saward v. Chicago, &c. R. R. Co., 30 Iowa, 551, 33 id. 386; Iba v. Hannibal, &c. R. R. Co., 45 Mo. 469. It cannot be required to fence its track where it runs upon a street or highway. Indianapolis, &c. R. R. Co. v. Warner, 35 Ind. 515; but it is required to fence its road where it is laid across the terminus of a street, — Toledo, &c. R. R. Co. v. Cary, 37 Ind. 172, — or where it runs along the side of a highway. Indianapolis, &c. R. R. Co. v. McKinney, 24 Ind. 283; Indianapolis, &c. R. R. Co. v. Guard, 24 Ind. 222.

prevent cattle from escaping from the highway upon its track.¹ But in most of the States the statute expressly requires that cattle-guards shall be constructed at all highway and farm crossings, and a neglect on the part of the company to erect suitable cattle-guards and keep them in repair renders it liable for injuries to cattle escaping from a highway upon its track by reason of such defect;² and the question as to whether a cattle-guard is sufficient or not is for the jury,³ and evidence of experts is not necessary; but the size of the cattle-guard, the kind of timber of which it is built, and the distance apart at which the timbers are laid being shown, the jury is competent to speak of its fitness.⁴ The company is also bound to keep its cattle-guards in repair,⁵ and free from snow or ice, which is liable to accumulate upon them and impair their usefulness.⁶ It will not be advisable to give the statutory provisions in reference either to fences or cattle-guards in the different States, as they differ essentially, and are merely local in their application.

SEC. 420. *Private Crossings: Gates, Bars, etc.* — Farm-crossings are generally required to be made in most of the States, and in some of them cattle-guards are required to be put in at such crossings; and where this is required, the duty exists whether the land was obtained by purchase or condemnation.⁷ At all private crossings the company is bound to put in either gates or bars as a part of the fence which it is required to maintain.⁸ The crossing may be built either over or under the track,⁹ where the one will answer as well as

¹ *Evansville, &c. R. R. Co. v. Barber*, 74 Ind. 169; *Pittsburgh, &c. R. R. Co. v. Eby*, 55 Ind. 567; *New Albany, &c. R. R. Co. v. Pace*, 13 Ind. 411; *Indianapolis, &c. R. R. Co. v. Irish*, 26 Ind. 268.

² *Cleveland, &c. R. R. Co. v. Newbrander*, 11 Am. & Eng. R. R. Cas. (Ohio) 183; *White v. Utica, &c. R. R. Co.*, 15 Hun (N. Y.), 333; *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Fawcett v. North Midland Ry. Co.*, 2 Eng. L. & Eq. 289. The duty devolves upon the company, and it cannot screen itself from liability upon the ground that the contractor neglected to carry out his contract to build necessary cattle-guards, etc. *Houston, &c. R. R. Co. v. Meador*, 50 Tex. 77.

³ *Swartout v. N. Y. Central, &c. R. R. Co.*, 7 Hun (N. Y.), 571; *Cleveland, &c. R. R. Co. v. Newbrander*, *ante*; *Chicago, &c. R. R. Co. v. Farrelly*, 3 Ill. App. 60.

⁴ *MULLIN, J.*, in *Swartout v. N. Y. Central R. R. Co.*, *ante*.

⁵ *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428; *Chicago, &c. R. R. Co. v. Reid*, 24 Ill. 144.

⁶ *Dunnigan v. Chicago, &c. R. R. Co.*, 18 Wis. 28.

⁷ *Clarke v. Rochester, &c. R. R. Co.*, 18 Barb. (N. Y.) 350.

⁸ *Hurd v. Rutland, &c. R. R. Co.*, 25 Vt. 116.

⁹ *St. Paul, &c. R. R. Co. v. Murphy*, 19 Minn. 500; *Wheeler v. Rochester, &c. R. R. Co.*, 12 Barb. (N. Y.) 227. A court of equity may compel a railroad company to build a crossing *under* its road when necessary for the convenience of the landowner. *Jones v. Seligman*, 16 Hun (N. Y.), 630.

ing.¹ It is not necessary that the killing should be shown to have been wantonly or wilfully done,² but it must appear that it was negligently done, which may be established by showing that the engine-driver did not use proper precautions to avoid accident.³ Thus, when animals are standing on the track of a railway, and can be seen by the persons running the train by the use of ordinary care, it is their duty to slacken speed or stop the train, if necessary, to avoid injuring them.⁴ The engine-driver in charge of a running train

62 Ala. 71. So a railway company is liable for damage resulting from injury or killing of stock by its train on the railway track, when the train is moving at a greater rate of speed than allowed by law. *Houston, &c. R. R. Co. v. Terry*, 42 Tex. 451. But a railway company is not authorized to diminish the speed of a train for the sake of avoiding injury to stock, if by so doing it augments the danger to passengers. There is no such thing as a *reasonable* increase of danger to passengers. *Sandham v. Chicago, &c. R. R. Co.*, 38 Iowa, 88. The rate of speed and the absence of signals may be shown as establishing negligence in the operation of the train. *Edson v. Central R. R. Co.*, 40 Iowa, 47. The rate of speed should depend upon the circumstances and locality. *Peoria, &c. R. R. Co. v. Miller*, 11 Brad. (Ill.) 875. In a Tennessee case it was held error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the road, the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light. *Louisville, &c. R. R. Co. v. Milam*, 9 Lea (Tenn.), 223. An owner may recover for his stock killed while running at large, if they were so at large without his fault. *Railway Co. v. Howard*, 11 Am. & Eng. R. R. Cas. (Ohio) 488. And contributory negligence is not chargeable to the owner in letting the stock run at large, when it breaks out of its

pasture without his fault. *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83. But where the evidence showed that the plaintiff's animal had strayed upon the defendant's track, and, despite the slackening of the speed of the train and the sounding of the whistle, the animal, instead of stepping off the track, had run ahead of the train until it had jumped into a bridge on the track and broken its leg, it was held that the defendant was not liable. In this case there was no evidence of any order of the board of commissioners directing that animals might be permitted to run at large. *Pittsburgh, &c. R. R. Co. v. Stuart*, 71 Ind. 500. The fact that the cattle injured were permitted to run at large will not shield the company from the consequences of the failure of its agents to observe proper care and vigilance. *Kentucky Central R. R. Co. v. Lebus*, 14 Bush (Ky.), 518. The permission of stock to run at large is not such negligence on the part of the owner as will defeat his action against a railway company for negligently killing the same. *Washington v. Baltimore, &c. R. R. Co.*, 17 W. Va. 190; *Kuhn v. Chicago, &c. R. R. Co.*, 42 Iowa, 420; *Mobile & Ohio R. R. Co. v. Williams*, 58 Ala. 595. If a person suffers his stock to run loose in a field through which an unfenced railroad track passes, he can only require such company to exercise ordinary care and prudence in respect to protection for such stock. *Peoria, &c. R. R. Co. v. Dugan*, 10 Brad. (Ill.) 233.

¹ *McKissock v. St. Louis, &c. R. R. Co.*, 73 Mo. 456.

² *Shuman v. Indianapolis, &c. R. R. Co.*, 11 Brad. (Ill.) 472.

³ *Trout v. Virginia, &c. R. R. Co.*, 23 Gratt. (Va.) 619.

⁴ *Shuman v. Indianapolis, &c. R. R. Co.*, 11 Brad. (Ill.) 472; *Rockford, &c.*

should always be on the lookout for obstructions, and when an obstruction is discovered, no matter when or where, should promptly resort to all means within his power, known to skilful engine-drivers, to avert the threatened injury or danger.¹

The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employes neglected those precautions which ordinary prudence suggests as necessary to avoid casualties.² To run a train composed of six or eight cars without a brakeman is gross negligence; and where such a train is in motion, and there is apparent danger, such as to induce the engine-driver to whistle for putting on the brakes, and there is a brakeman on the train, and he fails to apply the brakes, this implies gross negligence.³ But a railway company is not chargeable with negligence in injuring live stock on its track, unless it be shown that, after the stock was discovered, the company could, without imperilling the persons or property intrusted to it for transportation, have avoided the injury. Failure to ring the bell or sound the whistle does not constitute negligence *per se*; there must appear to be some necessary connection between the failure and the injury.⁴

SEC. 418. Contributory Negligence.—Where the owner of cattle is guilty of negligence which proximately contributes to the injury

R. R. Co. v. Rafferty, 73 Ill. 58; *Paris, &c. R. R. Co. v. Mullins*, 66 id. 526; *South, &c. R. R. Co. v. Jones*, 56 Ala. 507; *Missouri Pacific R. R. Co. v. Wilson*, 28 Kan. 637. But in some of the States it is held that the company is under no obligation to stop or even slacken the speed of its trains, where cattle are unlawfully on the track. *Durham v. Wilmington, &c. R. R. Co.*, 82 N. C. 252; *Central Ohio R. R. Co. v. Lawrence*, 18 Ohio St. 66; *Bemis v. Conn. & Pass. River R. R. Co.*, 42 Vt. 375; *Raiford v. Mississippi, &c. R. R. Co.*, 43 Miss. 233; *Price v. New Jersey, &c. R. R. Co.*, 31 N. J. L. 229; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *New Orleans, &c. R. R. Co. v. Field*, 46 Miss. 573.

¹ *South, &c. R. R. Co. v. Williams*, 65 Ala. 74.

² *South & North Alabama R. R. Co. v. Thompson*, 62 Ala. 594.

³ *Toledo, &c. R. R. Co. v. McGinnis*, 71 Ill. 346.

⁴ *Wallace v. St. Louis, &c. R. R. Co.*,

74 Mo. 594. In some of the States the courts hold that speed and punctuality in the running of trains, as well as the safety of passengers, are paramount considerations to which private interests must yield; and that to compel a railway company to slacken the speed of its trains, or stop them, whenever an animal is seen upon the track, would impose a burden upon them which would destroy all calculations as to the arrival of trains, etc., and compel them often to choose between pecuniary loss and injuries to their passengers, which would be unwise and unjust. *Maynard v. Boston, &c. R. R. Co.*, 115 Mass. 458; *Louisville, &c. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Needham v. San Francisco, &c. R. R. Co.*, 37 Cal. 409. But where the statute has prescribed the rate of speed at which trains may run, if it is running in excess of that rate, it is held liable for injuries inflicted while so running. *Maher v. Atlantic, &c. R. R. Co.*, 64 Mo. 267, and even where the statute has prescribed no rate.

the benefit of the widow and children the damages are confined to such a sum "as the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for their benefit, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures," and omitting anything for grief or sorrow over his death.¹

In a Virginia case² the rule was stated to be that such damages should be assessed, (1) by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime, if he had not been killed; and (2) by adding these to the value of his services in the superintendence, attention to, and care of his family and the education of his children, of which they have been deprived by his death. The damages recoverable by the widow for causing the death of the husband may be estimated with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future; and she is entitled to such sum as, in a pecuniary point of view, would make her whole.³ In an action by a parent to recover for the negligent killing of his minor child, it is presumed that the parent sustains a loss from the loss of such child's services, and allowance is to be made therefor;⁴ and it is not indispensable there should be proof of actual services of pecuniary value rendered to the next of kin, nor that any witness should express an opinion as to the value of such services, before a recovery can be had. Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship will warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation under the statute may be given.⁵

¹ Penn. R. R. Co. v. Butler, 57 Penn. St. 335; Illinois, &c. R. R. Co. v. Baches, 55 Ill. 379; Kansas, &c. R. R. Co. v. Cutter, 19 Kan. 83; Huntingdon, &c. R. R. Co. v. Decker, 84 Penn. St. 419; March v. Walker, 48 Tex. 372. But see Benson v. Green Mountain Gold Mining Co., 57 Cal. 20, where loss of society is held to be an element of damage.

² Baltimore, &c. R. R. Co. v. Wightman, 29 Gratt. (Va.) 431.

³ Rafferty v. Buckman, 46 Iowa, 195.

⁴ Rockford, &c. R. R. Co. v. Delaney, 82 Ill. 198; Chicago v. Hesing, 83 Ill. 204.

⁵ Chicago v. Scholten, 75 Ill. 468.

And testimony is admissible respecting the general nature of the employment of the decedent's father, that the jury may consider its probable effect in determining the pursuits of decedent. The Carlisle life-tables are also admissible to show the expectancy of life. The computation, however, should be made from the date of decedent's death, and not from the age of twenty-one, although recovery dates from that time.¹ Substantial damages may be recovered, notwithstanding such recovery must be based upon the probable accumulation of an estate after the infant has reached his majority.² And where the action is for the benefit of a parent, evidence has been held to be admissible to show such parent's probable need of the services of the child.³ As a rule, the recovery is to be limited to the value of such services until the child would attain the age of majority, unless there are facts which warrant a reasonable expectation of a pecuniary benefit therefrom after the child attains that age.⁴ If the action is brought to recover for the death of an adult child, it must be shown that it was at the time residing with the parent, or that it had never been emancipated from the family, and was at the time contributing towards the parent's support, or had promised to do so.⁵ Of course, where an action is brought by a husband to recover for the killing of his wife, or by a wife to recover for the killing of her husband, the relation must be proved as in other cases.⁶ Where an action is brought for the benefit of collateral next of kin whom the deceased was not legally bound to support, they must show either that they had actually been supported by him, or that there was a probability that they would have received support or pecuniary benefit from him if he had lived.⁷

SEC. 415. Limitation of Actions upon these Statutes.—In many of these statutes it is provided that the action shall be brought within two years from the time of the death of the person injured; and in such cases there can be no question as to when the statute

¹ *Walters v. Chicago, R. L., & P. R. R. Co.*, 41 Iowa, 71.

² *Walters v. Chicago, R. L., & P. R. R. Co.*, 41 Iowa, 71.

³ *Ewen v. Chicago, &c. R. R. Co.*, 38 Wis. 613.

⁴ *Potter v. Chicago, &c. R. R. Co.*, 21 Wis. 372; *Penn. R. R. Co. v. Zebe*, 33 Penn. St. 318; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188; *Houston, &c. R. R. Co. v. Mixon*, 52 Tex. 19; *Rockford, &c. R. R. Co. v. Delaney*, 82 Ill. 198.

⁵ *Penn. R. R. Co. v. Adams*, 55 Penn. St. 499; *Penn. R. R. Co. v. Keller*, 67 Penn. St. 499; *Franklin v. South-Eastern Ry. Co.*, 3 H. & N. 211.

⁶ *Toledo, &c. R. R. Co. v. Brooks*, 81 Ill. 245; *Conant v. Griffin*, 48 Ill. 410; *Kansas, &c. R. R. Co. v. Miller*, 2 Cal. 442.

⁷ *Dunhene v. Ohio Life & Trust Co.* 1 Dis. (Ohio) 257; *Chicago, &c. R. R. Co. v. Moranda*, 93 Ill. 302; *Gratinkemper v. Harria*, 25 Ohio St. 510.

of a railway company at a point where there are no barriers, and after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might, in their judgment, fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover.¹ Where, however, a person's cattle get upon a railway track without fault on his part,² as, if they escape from a well-fenced field³ or from the custody of the owner or his servant without fault on their part while driving them along a highway, he is not precluded from a recovery if they are injured or killed by the negligence of a railway company on whose track they escaped. Indeed, the negligence of a party must be the immediate, proximate cause of an injury, to render him liable therefor; and the same rule applies to the contributory negligence which would relieve him from liability. An instruction which stated that the negligence of the plaintiff must have contributed "directly" to the injury, to excuse the defendant, was held to come within the rule.⁴ In an action

track from swine, in a township where they are not permitted to run at large, and it appears that an animal is killed by the negligence of the railroad company, and that the negligence of the owner in permitting the animal to run at large, in violation of the statute, contributed directly to the injury, that the negligence of the defendant is offset by the negligence of the plaintiff, and the owner of the animal cannot recover. *Kansas City, &c. R. R. Co. v. McHenry*, 24 Kan. 501. If domestic animals are on the track of a railroad by the fault of the owner, the owner takes all reasonable risks of injury to them from passing trains; and while the railroad company is not bound to presume that such animals will be upon the track, they are not authorized to injure them wilfully or carelessly, but are bound to use reasonable care to avoid injuring them. But considering the relative value and importance of a train, and of the lives of the persons upon it, as compared with the value of domestic animals, a proper regard for both train and cattle would make the duty to avoid injury to the train, and to those upon it, primary and paramount to the duty of avoiding injury to the cattle. *Witherall v. Milwaukee, &c. R. R. Co.*, 24

Minn. 410; *O'Connor v. Chicago, &c. R. R. Co.*, 27 Minn. 166. In Pennsylvania it is held that a railway company is not liable for injuries to cattle straying upon its track, unless it is wantonly or wilfully inflicted. *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Drake v. Phila. &c. R. R. Co.*, 51 Penn. St. 240.

¹ *Amstein v. Gardner*, 134 Mass. 4.

² *Trout v. Virginia, &c. R. R. Co.*, 23 Gratt. (Va.) 619.

³ *Somner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Toledo, &c. R. R. Co. v. Milligan*, 52 Ind. 505; *Chicago, &c. R. R. Co. v. Harria*, 54 Ill. 428; *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83; *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497; *Bulkley v. N. Y. & New Haven R. R. Co.*, 27 Conn. 479; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428.

⁴ *Gates v. Burlington, &c. R. R. Co.*, 39 Iowa, 45; *Towne v. Nashua, &c. R. R. Co.*, 124 Mass. 110; *White v. Concord R. R. Co.*, 30 N. H. 188; *Housatonic R. R. Co. v. Waterbury*, 23 Conn. 101; *Horn v. Atlantic, &c. R. R. Co.*, 35 N. H. 169. Indeed, in those States in which the common-law rule as to the owner's duty to restrain cattle prevails, cattle which are at large upon a highway are treated as

against a railway company for damages for loss caused by the latter's negligence, an instruction to the effect that the plaintiff could recover, if he showed by a preponderance of evidence that the loss resulted from the negligence of the defendant, was held defective in failing to instruct the jury that the plaintiff could not recover if his own negligence contributed to the loss.¹ In an action for the value of the plaintiff's horse, which escaped upon the defendant's railway from an adjoining field and was killed by a train, in consequence of a defect in the defendant's fence at that place, it was held that if it had appeared that the horse was breachy, and accustomed to jump or break lawful fences, and that the plaintiff, knowing these facts, turned him loose in the field adjoining the track, the jury might have found upon this evidence that the plaintiff was guilty of contributory negligence, though the court could not so hold as a matter of law.² It is held in some of the cases not to be conclusive evidence of negligence for the owner of cattle knowingly to permit them to run at large in a pasture next to a railroad track, where the fence is out of repair,³ and that whether it is or not is a question of

trespassers, and their owners as wrongdoers; and if they stray upon the track at a point where the company is not bound to fence, the latter is not liable unless the injury is inflicted by gross negligence, which may be said to be wilful. *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 164; *Halloran v. N. Y. & Harlem R. R. Co.*, 2 E. D. S. (N. Y. C. P.) 257; *Fitch v. Buffalo, &c. R. R. Co.*, 13 Hun (N. Y.), 668; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516; *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428. But holding the company liable for mere negligence, see *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Indianapolis, &c. R. R. Co. v. McKinney*, 24 Ind. 283; *Chicago, &c. R. R. Co. v. Morrow*, 67 Ill. 218; *Springfield, &c. R. R. Co. v. Andrew*, 68 Ill. 57.

¹ *McCormick v. Chicago, Rock Island & Pacific R. R. Co.*, 47 Iowa, 345.

² *Jones v. Sheboygan, &c. R. R. Co.*, 42 Wis. 306.

³ *Evans v. St. Paul R. R. Co.*, 30 Minn. 489; *Ohio, &c. R. R. Co. v. Fowler*, 35 Ill. 21; *St. Louis, &c. R. R. Co. v. Ladd*, 36 Ill. 409; *Toledo, &c. R. R. Co. v. Ferguson*, 42 Ill. 449; *Corwin v.*

N. Y. & Erie R. R. Co., 13 N. Y. 42; *Brady v. Rensselaer R. R. Co.*, 1 Hun (N. Y.), 378. In this case, a cow was left in charge of a boy who drove her upon an unenclosed lot near the defendant's track, and left her for a short time, and she strayed upon the track and was killed by a train. It was held that the plaintiff was entitled to recover. *MILLER, P. J.*, said: "In *Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516, it was held that where one suffered his cow to be at large in a public street, and on the track of a railroad in a city, apparently alone and unattended, with no one to take charge of her, and where it did not appear that she was in the vicinity of the plaintiff's residence, or had been previously taken care of by him, or had escaped without his fault, or was lawfully travelling along the street, that he could not recover for injuries to the cow, happening through the negligence of the railroad company. This was an extreme case, and differs essentially from the case at bar, for here the cow was kept and fed in the plaintiff's stable, and only allowed to go out in charge of a boy employed for that purpose, and then not very far from the plaintiff's residence. The plaintiff had taken every precaution to

cases a railroad company is only liable for injuries to cattle upon its track which result from its negligence.¹ Indeed, where a statutory duty to fence is not imposed upon the company, cattle straying upon the track are trespassers, and the owner of them is liable to the company for any injury to its trains or other property by reason of such trespass.² The right of the company to the exclusive use of its

a railroad company in pursuance of the provisions of the general railroad act, for the convenience of the owners of the adjoining land, and such gate is continually left open by the agents or servants of the company, or by those doing business with it, the fence is not maintained within the true intent and meaning of the statute, and the company is liable for any injury occasioned thereby. And that the mere fact that cattle are found upon the track without evidence of any right or authority from the company does not, of itself, establish negligence on the part of the owner of the cattle.

¹ *Turner v. St. Louis, &c. R. R. Co.*, 76 Mo. 261; *Little Rock, &c. R. R. Co. v. Henson*, 39 Ark. 413; *Orange, &c. R. R. Co. v. Miles*, 76 Va. 773; *Missouri, &c. R. R. Co. v. Wilson*, 28 Kan. 637. The owner of cattle, at the common law, is bound to keep them in. *Baltimore, &c. R. R. Co. v. Lamborn*, 12 Md. 257; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *Vicksburgh, &c. R. R. Co. v. Patton*, 81 Miss. 156; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Vickers v. Pacific R. R. Co.*, 42 Mo. 193; *McPheeters v. Pacific R. R. Co.*, 45 Mo. 22. Cattle are regarded as free commoners in Kansas. *Union Pacific R. R. Co.*, 5 Kan. 168. In Michigan and some other States they may be so by vote of the town. *Williams v. Michigan, &c. R. R. Co.*, 2 Mich. 259; *Ohio, Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Cranston v. Cincinnati, &c. R. R. Co.*, 1 Hardy (Ohio), 193; *Murry v. So. Carolina R. R. Co.*, 10 Rich. (S. C.) 227. And while it is not negligence *per se* for the owners of cattle to permit them to run at large, yet a railway company is not liable for injuries inflicted upon them unless negligence is fairly imputable to it. In Illinois—*Chicago, &c. R. R. Co. v. Cuffman*, 38 Ill. 424; *Toledo, &c. R. R. Co. v. Fergusson*, 42 Ill. 449—and Iowa

—*Alger v. Mississippi, &c. R. R. Co.*, 21 Iowa, 374—cattle are permitted to run, upon the ground that there is no law against it. See also *Macon, &c. R. R. Co. v. Baher*, 42 Ga. 300; *Macon, &c. R. R. Co. v. Lester*, 30 Ga. 911. In several of the States, however, especially the Eastern States, the common-law rule prevails, and the owner of cattle must restrain them; and the fact that they are at large being *prima facie* evidence that they are so with his permission, is *prima facie* evidence of negligence on his part. *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Den. (N. Y.) 255; *Indianapolis, &c. R. R. Co. v. Harter*, 38 Ind. 557; *Louisville, &c. R. R. Co. v. Milton*, 14 B. Mon. (Ky.) 75; *Perkins v. Eastern R. R. Co.*, 29 Me. 307; *Price v. New Jersey R. R. Co.*, 31 N. J. L. 229; 32 id. 19; *Vandegrift v. Rediker*, 22 N. J. L. 185; *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 101; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428. This was formerly the rule in Illinois. *Illinois Central R. R. Co. v. Phelps*, 29 Ill. 447. In some of the States it is held that a railway company, in the absence of negligence, is not liable even though cattle escape upon the track from a well-fenced field. *North Penn. R. R. Co. v. Rehman, ante*.

² *Eames v. Salem, &c. R. R. Co.*, 98 Mass. 560. In Annapolis, &c. R. R. Co. v. Baldwin, 60 Md.—, where the company's cars were thrown off the track by a collision with the defendant's ox, which was at the time on the track, through the negligence of the owner, the railway company not being at fault, it was held that the defendant was liable. See also, to the same effect, *Drake v. Pittsburgh, &c. R. R. Co.*, 51 Penn. St. 240; *Housatonic, &c. R. R. Co. v. Knowles*, 30 Conn. 313; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 293; *Northeastern R. R. Co. v. Sineath*, 8 Rich. (S. C.) 185; *Sinram v. Pittsburgh, &c. R. R. Co.*, 28 Ind. 244;

grounds and tracks is well established, and is essential to the safety of the operation of its trains and the general conduct of its business; and it is under no obligation to keep up a lookout for cattle trespassing upon its track, so far as the rights of the owners of the cattle are concerned, and is generally held to be liable for injuries to cattle

Hannibal, &c. R. R. Co. v. Kenney, 41 Mo. 272. In the Maryland case cited *ante*, ROBINSON, J., said: "The English decisions in actions of negligence fully sustain, we think, this view. In *Child v. Hearn*, L. R. 9 Exch. 176, the plaintiff, in the employment of a railroad company, was returning from his work along the line upon a trolley propelled by hand, and ran over the defendant's pigs, which had escaped from the defendant's land; the trolley was upset and the plaintiff injured. In an action of damages by the plaintiff against the owner of the pigs, it was held the owner was not liable, because the proof showed that the pigs escaped through a defect in the fence, which belonged to the company, and which it was the duty of the company to keep in repair. The liability of the defendant was not, however, questioned, if the pigs had in fact escaped from his lane through his negligence. So in *Lee v. Riley*, 18 C. B. (N. S.) 722, where the plaintiff's mare strayed into an adjoining close through defect in a fence which it was the duty of the defendant to keep in repair, and while there kicked and injured the plaintiff's horse, it was held the defendant was liable. And in *Powell v. Salisbury*, 2 Y. & J. 391, where the plaintiff's horse escaped into the defendant's close through a defective fence which it was the duty of the defendant to keep in repair, and was killed by the falling of a haystack, it was held, even in such a case as that, the damage was not too remote. And then again, in the still later case of *Lawrence v. Jenkins*, L. R. 8 Q. B. 274, where the plaintiff's cow escaped upon the defendant's land, through a fence which the defendant was bound to keep in repair, and while there ate the leaves of a yew-tree, in consequence of which the cow died, the defendant was held liable for the damage. In all these cases the court held the injury to be the consequence of the defendant's negligence, and such being the case he was liable. The first count pre-

sents quite a different question. It merely alleges that the ox was trespassing upon the road, and does not allege that it was trespassing through the negligence of the defendant. Every one, it is true, is obliged to keep his stock within his enclosures, and if they escape upon the land of another, whether through the negligence of the owner or not, and tread down the grass or destroy the crops, the owner is, in an action of trespass, liable for the damage. The common law, which requires every one to keep his stock within his own bounds at his peril, is the law of this State. But this is not an action of trespass to recover for direct and immediate injuries resulting from an estray. It is an action on the case for consequential damages resulting from the estray. And to entitle the plaintiff, in such an action, to consequential damages, he must allege and prove that the injury was the result of the defendant's negligence. If the ox escaped from his enclosures without the knowledge and without any fault of the defendant, we are of opinion he would not be liable in this action for consequential damages. There can be no reason for extending the rigorous rule of the common law, which holds the owner liable in an action of trespass, whether his cattle escape through negligence or not, to an action on the case by a railroad company seeking to recover consequential damages. It is the privilege of such companies to invade every one's property, and build and construct their road wherever they may see fit, and to do so in this State, without being obliged to erect and maintain fences along the line. Even with the best care cattle will sometimes escape from enclosures, and to hold the owner liable for consequential damages, where the escape is without his fault or negligence, would be to subject every one along the line of a railroad to the peril of being ruined, and ruined too without any fault on his part."

trespassing there only when they result from the reckless or wilful misconduct of its agents, in the operation of its trains, or the conduct of its business.¹ This rule has been held in New York,² Massachusetts,³ Kentucky,⁴ Kansas,⁵ Colorado,⁶ Michigan,⁷ Indiana,⁸ Pennsylvania,⁹ New Jersey,¹⁰ Rhode Island,¹¹ and Wisconsin.¹² But in several States it is held that a railway company is liable for injuries to cattle trespassing upon its tracks, if by the exercise of ordinary care they could have been prevented.¹³ But in these States the plaintiff

¹ *Drake v. Philadelphia, &c. R. R. Co.*, 51 Penn. St. 240; *Tower v. Providence, &c. R. R. Co.*, 2 R. I. 404; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Central Branch R. R. Co. v. Lea*, 20 Kan. 553; *Williams v. Michigan Central R. R. Co.*, 2 Mich. 209; *Price v. New Jersey, &c. R. R. Co.*, 32 N. J. L. 19; *Bennett v. Chicago, &c. R. R. Co.*, 19 Wis. 145; *O'Bannon v. Louisville, &c. R. R. Co.*, 8 Bush (Ky.), 348; *Jeffersonville, &c. R. R. Co. v. Underhill*, 48 Ind. 389.

² *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516; *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428; *Mentges v. New York, &c. R. R. Co.*, 1 Hilt. (N. Y. C. P.) 425; *Clark v. Syracuse, &c. R. R. Co.*, 11 Barb. (N. Y.) 112; *Terry v. N. Y. Central R. R. Co.*, 22 Barb. (N. Y.) 574; *Talmadge v. Rensselaer, &c. R. R. Co.*, 13 Barb. (N. Y.) 493; *Marsh v. N. Y. & Erie R. R. Co.*, 14 Barb. (N. Y.) 364.

³ *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 564; *Maynard v. Boston & Maine R. R. Co.*, 115 Mass. 458. In this State it is held that if cattle—as in this instance a horse—are put into a pasture properly fenced, but escape therefrom into a highway, and thence go upon a railway track at a point at which the corporation is bound to, but has neglected to maintain a cattle-guard, and are killed or injured by a train, the company is not liable unless there was reckless or wanton misconduct on the part of those operating the train. *Darling v. Boston, &c. R. R. Co.*, 121 Mass. 118. But see *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 163; *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665, holding otherwise.

⁴ *Louisville, &c. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *O'Bannon v. Louisville, &c. R. R. Co.*, 8 Bush (Ky.), 348.

⁵ *Central Branch R. R. Co. v. Lea*, 353.

⁶ *Denver, &c. R. R. Co. v. Olsem*, 4 Col. 239.

⁷ *Williams v. Michigan Central R. R. Co.*, 2 Mich. 259.

⁸ *Jeffersonville, &c. R. R. Co. v. Ballard*, 48 Ind. 389; *New Albany, &c. R. R. Co. v. McNamara*, 11 Ind. 543; *Jeffersonville, &c. R. R. Co. v. Huber*, 42 Ind. 173; *Michigan Southern R. R. Co. v. Fisher*, 27 Ind. 96.

⁹ *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 101.

¹⁰ *Price v. New Jersey, &c. R. R. Co.*, 32 N. J. L. 19; *Vandegrift v. Rediker*, 21 N. J. L. 185.

¹¹ *Tower v. Providence, &c. R. R. Co.*, 2 R. I. 404.

¹² *Fisher v. Farmers' Loan, &c. Co.*, 21 Wis. 73; *Pritchard v. La Crosse, &c. R. R. Co.*, 7 Wis. 232; *Chicago, &c. R. R. Co.*, 17 Wis. 428.

¹³ *Fossier v. Morgan's Louisiana, &c. R. R. Co.*, 1 McGloin (La.), 349; *Louisville, &c. R. R. Co. v. Wainscott*, 3 Bush (Ky.), 149; *Kentucky Central R. R. Co. v. Lehus*, 14 B. Mon. (Ky.) 518; *Louisville, &c. R. R. Co. v. Milton*, 14 B. Mon. (Ky.) 75. Where cattle are at large without the fault of the owner, and go upon the track of a railroad, and are there killed through the negligence of the railroad company in the management of their train, the owner is not precluded from the right to recover damages by the fact that the cattle were trespassers on the railroad. *Isbell v. N. Y. & New Haven R. R. Co.*, 27 Conn. 393; *Trow v. Vt. Central R. R. Co.*, 24 Vt. 487; *Jackson v. Rutland, &c.*

cannot recover without proof of negligence on the part of the company,¹ and negligence cannot be inferred from the mere fact of kill-

R. R. Co., 25 Vt. 150; *Needham v. San Francisco*, &c. R. R. Co., 37 Cal. 409; *Witherell v. Milwaukee*, &c. R. R. Co., 24 Minn. 410; *Locke v. St. Paul*, &c. R. R. Co., 15 Minn. 350; *Baltimore*, &c. R. R. Co. v. *Mulligan*, 45 Md. 486; *Cincinnati*, &c. R. R. Co. v. *Smith*, 22 Ohio St. 227; *Kerwacker v. Cleveland*, &c. R. R. Co., 3 Ohio St. 172; *Cincinnati*, &c. R. R. Co. v. *Waterson*, 4 Ohio St. 424; *Indianapolis*, &c. R. R. Co. v. *Caldwell*, 9 Ind. 397; *Pittsburgh*, &c. R. R. Co. v. *Stuart*, 71 Ind. 500; *Nashville*, &c. R. R. Co. v. *Anthony*, 1 Lea (Tenn.), 516; *Illinois Central R. Co. v. Middleworth*, 46 Ill. 494; *Toledo*, &c. R. R. Co. v. *McGinnis*, 71 Ill. 346; *Peoria*, &c. R. R. Co. v. *Dugan*, 10 Brad. (Ill.) 233. It is held in these States to be the duty of an engine-driver to keep a constant and careful lookout for stock upon the track; and although stock be wrongfully there, yet he must use ordinary care and diligence to discover it and avoid injury to it, or the company will be liable for the injury done to it. *Little Rock*, &c. R. R. Co. v. *Finley*, 37 Ark. 562. But it is not always necessary that the engine-driver should stop the train or slacken its speed, on discovering stock on the track. Ordinary prudence requires him to promptly endeavor to drive them off by sounding the whistle, but does not require him to stop, or slacken the speed of the train, when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger. *Little Rock*, &c. R. R. Co. v. *Trotter*, 37 Ark. 593. The operation of a train with the engine behind it was held not to be negligent where a man was stationed on the front end to keep watch, and the train was moved slowly. *Falconer v. European & North American R. R. Co.*, 1 Pugsley (N. B.), 179. Where the distance to which the light was thrown by the head-light, which was in proper order

and of the best kind in use, is not shown, but only that the engineer could not perceive by its light, at thirty yards distance, a young mule of the color of the earth about a culvert in which it was fastened, and could not stop in forty yards distance, and there is no evidence as to how much of the mule was above the track, it is error to charge the jury that it was negligence to run the train at a rate of speed at which the engine-driver could not stop before reaching the mule after seeing it was on the track. Whether or not this was negligence was a question for the jury, in view of all the facts, under appropriate instructions from the court. *Memphis*, &c. R. R. Co. v. *Lyon*, 62 Ala. 71. Imperfect light and fog at the time of killing stock by a railroad train are circumstances that the jury may take into consideration in determining negligence. *St. Louis*, &c. R. R. Co. v. *Vincent*, 36 Ark. 451. The fact that the person in charge of the defendant's locomotive was a fireman, not a skilled engine-driver, is entirely immaterial in an action where the evidence shows the collision was not occasioned by any lack of skill on his part. *Culhane v. N. Y. Central*, &c. R. R. Co., 60 N. Y. 193. It is the duty of a railway company to provide a sufficient number of brakes upon a train to stop it within a reasonable time and distance, and a failure to do so is negligence. *Forbes v. Atlantic*, &c. R. R. Co., 76 N. C. 454. In the absence of any statute limiting the rate of speed of railway trains, no conceivable rate is evidence of negligence *per se*. *McKonkey v. Chicago*, &c. R. R. Co., 40 Iowa, 205. But it has been held to be negligence in a railway company to run its trains on a straight track in the night-time, at such a rate of speed that the train cannot be stopped in the distance at which the engine-driver can see cattle or other obstructions on the track by the aid of the head-light. *Memphis*, &c. R. R. Co. v. *Lyon*,

¹ *Cincinnati*, &c. R. R. v. *Co. Bartlett*, 58 Ind. 572; *Turner v. St. Louis*, &c. R. R. Co., 76 Mo. 261; *Railroad Co. v.*

McMillan, 37 Ohio St. 554; *Railroad Co. v. Heiskell*, 38 Ohio St. 666.

ing.¹ It is not necessary that the killing should be shown to have been wantonly or wilfully done,² but it must appear that it was negligently done, which may be established by showing that the engine-driver did not use proper precautions to avoid accident.³ Thus, when animals are standing on the track of a railway, and can be seen by the persons running the train by the use of ordinary care, it is their duty to slacken speed or stop the train, if necessary, to avoid injuring them.⁴ The engine-driver in charge of a running train

62 Ala. 71. So a railway company is liable for damage resulting from injury or killing of stock by its train on the railway track, when the train is moving at a greater rate of speed than allowed by law. *Houston, &c. R. R. Co. v. Terry*, 42 Tex. 451. But a railway company is not authorized to diminish the speed of a train for the sake of avoiding injury to stock, if by so doing it augments the danger to passengers. There is no such thing as a *reasonable* increase of danger to passengers. *Sandham v. Chicago, &c. R. R. Co.*, 88 Iowa, 88. The rate of speed and the absence of signals may be shown as establishing negligence in the operation of the train. *Edson v. Central R. R. Co.*, 40 Iowa, 47. The rate of speed should depend upon the circumstances and locality. *Peoria, &c. R. R. Co. v. Miller*, 11 Brad. (Ill.) 875. In a Tennessee case it was held error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the road, the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light. *Louisville, &c. R. R. Co. v. Milam*, 9 Lea (Tenn.), 223. An owner may recover for his stock killed while running at large, if they were so at large without his fault. *Railway Co. v. Howard*, 11 Am. & Eng. R. R. Cas. (Ohio) 433. And contributory negligence is not chargeable to the owner in letting the stock run at large, when it breaks out of its

pasture without his fault. *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83. But where the evidence showed that the plaintiff's animal had strayed upon the defendant's track, and, despite the slackening of the speed of the train and the sounding of the whistle, the animal, instead of stepping off the track, had run ahead of the train until it had jumped into a bridge on the track and broken its leg, it was held that the defendant was not liable. In this case there was no evidence of any order of the board of commissioners directing that animals might be permitted to run at large. *Pittsburgh, &c. R. R. Co. v. Stuart*, 71 Ind. 500. The fact that the cattle injured were permitted to run at large will not shield the company from the consequences of the failure of its agents to observe proper care and vigilance. *Kentucky Central R. R. Co. v. Lebus*, 14 Bush (Ky.), 518. The permission of stock to run at large is not such negligence on the part of the owner as will defeat his action against a railway company for negligently killing the same. *Washington v. Baltimore, &c. R. R. Co.*, 17 W. Va. 190; *Kuhn v. Chicago, &c. R. R. Co.*, 42 Iowa, 420; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595. If a person suffers his stock to run loose in a field through which an unfenced railroad track passes, he can only require such company to exercise ordinary care and prudence in respect to protection for such stock. *Peoria, &c. R. R. Co. v. Dugan*, 10 Brad. (Ill.) 233.

¹ *McKissock v. St. Louis, &c. R. R. Co.*, 73 Mo. 456.

² *Shuman v. Indianapolis, &c. R. R. Co.*, 11 Brad. (Ill.) 472.

³ *Trout v. Virginia, &c. R. R. Co.*, 23 Gratt. (Va.) 619.

⁴ *Shuman v. Indianapolis, &c. R. R. Co.*, 11 Brad. (Ill.) 472; *Rockford, &c.*

should always be on the lookout for obstructions, and when an obstruction is discovered, no matter when or where, should promptly resort to all means within his power, known to skilful engine-drivers, to avert the threatened injury or danger.¹

The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employes neglected those precautions which ordinary prudence suggests as necessary to avoid casualties.² To run a train composed of six or eight cars without a brakeman is gross negligence; and where such a train is in motion, and there is apparent danger, such as to induce the engine-driver to whistle for putting on the brakes, and there is a brakeman on the train, and he fails to apply the brakes, this implies gross negligence.³ But a railway company is not chargeable with negligence in injuring live stock on its track, unless it be shown that, after the stock was discovered, the company could, without imperilling the persons or property intrusted to it for transportation, have avoided the injury. Failure to ring the bell or sound the whistle does not constitute negligence *per se*; there must appear to be some necessary connection between the failure and the injury.⁴

SEC. 418. Contributory Negligence.—Where the owner of cattle is guilty of negligence which proximately contributes to the injury

R. R. Co. v. Rafferty, 73 Ill. 58; Paris, &c. R. R. Co. v. Mullins, 66 id. 526; South, &c. R. R. Co. v. Jones, 56 Ala. 507; Missouri Pacific R. R. Co. v. Wilson, 28 Kan. 637. But in some of the States it is held that the company is under no obligation to stop or even slacken the speed of its trains, where cattle are unlawfully on the track. Durham v. Wilmington, &c. R. R. Co., 82 N. C. 252; Central Ohio R. R. Co. v. Lawrence, 13 Ohio St. 66; Bemis v. Conn. & Pass. River R. R. Co., 42 Vt. 375; Raiford v. Mississippi, &c. R. R. Co., 43 Miss. 233; Price v. New Jersey, &c. R. R. Co., 81 N. J. L. 229; Locke v. St. Paul, &c. R. R. Co., 15 Minn. 350; New Orleans, &c. R. R. Co. v. Field, 46 Miss. 573.

¹ South, &c. R. R. Co. v. Williams, 65 Ala. 74.

² South & North Alabama R. R. Co. v. Thompson, 62 Ala. 594.

³ Toledo, &c. R. R. Co. v. McGinnis, 71 Ill. 346.

⁴ Wallace v. St. Louis, &c. R. R. Co.,

74 Mo. 594. In some of the States the courts hold that speed and punctuality in the running of trains, as well as the safety of passengers, are paramount considerations to which private interests must yield; and that to compel a railway company to slacken the speed of its trains, or stop them, whenever an animal is seen upon the track, would impose a burden upon them which would destroy all calculations as to the arrival of trains, etc., and compel them often to choose between pecuniary loss and injuries to their passengers, which would be unwise and unjust. Maynard v. Boston, &c. R. R. Co., 115 Mass. 458; Louisville, &c. R. R. Co. v. Ballard, 2 Met. (Ky.) 177; Needham v. San Francisco, &c. R. R. Co., 37 Cal. 409. But where the statute has prescribed the rate of speed at which trains may run, if it is running in excess of that rate, it is held liable for injuries inflicted while so running. Maher v. Atlantic, &c. R. R. Co., 64 Mo. 267, and even where the statute has prescribed no rate.

or killing of his cattle upon a railway, he cannot recover therefor;¹ and the question as to whether he was guilty of such contributory negligence is generally one of fact to be determined by the jury in view of the circumstances; and especially is this the case when the question is open to doubt or debate.² If a person wantonly or carelessly drives stock upon the track of a railroad, he is guilty of contributory negligence; and if the stock is injured, he cannot recover.³ But where cattle escape from their owner's land upon an adjoining railway and are killed by an engine, the mere fact that the owner turned them upon his land where there was no fence between it and the railway, when it was the legal duty of the company to build it, is not proof of contributive negligence on his part.⁴ But if a horse

¹ *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454; *Indianapolis, &c. R. R. Co. v. Caudle*, 60 Ind. 112; *Toledo, &c. R. R. Co. v. Head*, 62 Ill. 233; *Jeffersonville, &c. R. R. Co. v. Adams*, 43 Ind. 402; *Cincinnati, &c. R. R. Co. v. Street*, 50 Ind. 225; *Williams v. Northern Pacific R. R. Co.*, 11 Am. & Eng. R. R. Cas. (Dak.) 421.

² *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665; *Evans v. St. Paul, &c. R. R. Co.*, 30 Minn. 489; *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450; *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360.

³ *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454.

⁴ *Wilder v. Maine Central R. R. Co.*, 65 Me. 332. In several of the States the common-law rule, which requires the owner of cattle to keep them upon his own land, does not prevail. *Burgwyn v. Whitfield*, 81 N. C. 261; *Studwell v. Ritch*, 14 Conn. 292; *Russell v. Hanley*, 20 Iowa, 219; *Stoner v. Shugart*, 45 Ill. 76; *Headen v. Rust*, 39 Ill. 186; *Seeley v. Peters*, 10 Ill. 180. And the mere fact that he permits them to stray from his land does not release the company from its obligation to use ordinary care. *Chicago, &c. R. R. Co. v. Engle*, 84 Ill. 397; *Toledo, &c. R. R. Co. v. Deacon*, 63 Ill. 91; *Rockford, &c. R. R. Co. v. Rafferty*, 73 Ill. 58; *Toledo, &c. R. R. Co. v. Ingraham*, 58 Ill. 120; *Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Cincinnati, &c. R. R. Co. v. Smith*, 22 Ohio St. 227; *Laws v. North Carolina R. R. Co.*, 7 Jones (N. C.), 468;

Alger v. Mississippi, &c. R. R. Co., 10 Iowa, 268; *Kuhn v. Chicago, &c. R. R. Co.*, 42 Iowa, 420; *Smith v. Chicago, &c. R. R. Co.*, 34 Iowa, 506; *Evans v. Burlington, &c. R. R. Co.*, 21 Iowa, 374; *Balcom v. Dubuque, &c. R. R. Co.*, 21 Iowa, 102; *Whittek v. Dubuque, &c. R. R. Co.*, 21 Iowa, 103; *Marietta, &c. R. R. Co. v. Stevenson*, 24 Ohio St. 48; *Coyle v. Baltimore, &c. R. R. Co.*, 11 W. Va. 94; *Baylor v. Baltimore, &c. R. R. Co.*, 9 W. Va. 270; *Georgia, &c. R. R. Co. v. Neeley*, 56 Ga. 540; *Vicksburgh, &c. R. R. Co. v. Patton*, 31 Miss. 156; *Raiford v. Mississippi, &c. R. R. Co.*, 43 Miss. 233; *Mississippi, &c. R. R. Co. v. Miller*, 40 Miss. 45; *Tarewater v. Hannibal, &c. R. R. Co.*, 42 Mo. 193; *McPheeters v. Hannibal, &c. R. R. Co.*, 45 Mo. 22; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Hannibal, &c. R. R. Co. v. Kenney*, 41 Mo. 271. If the owner of cattle knowingly permits them to run at large in the vicinity of a railway, where it is not required by law to be fenced, and they stray upon the track and are killed, it not appearing that the killing is wilfully done, the company will not be liable, although the owner may not have known that the railway was completed. *Jeffersonville, &c. R. R. Co. v. Adams*, 43 Ind. 402. But it is not conclusive evidence of contributory negligence to allow cattle to run at large in a pasture next to a railway where the railway fence is out of repair. *Evans v. St. Paul & Sioux City R. R. Co.*, 30 Minn. 489. And whether, in exercising his right to use his land, the land-owner has been guilty of negligence

escapes from the control of the owner's agent through his negligence, and, after running six hundred and fifty feet, enters upon the tracks

contributing to an injury to his cattle, is ordinarily a question of fact for a jury, to be determined with reference to all the circumstances of the case. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is not such negligence on the part of the land-owner, in law, notwithstanding the company's road is unfenced, and notwithstanding there is another railroad within a few hundred feet. *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360. Thus, in an Iowa case, it was held that the question whether or not the owner of a blind horse was guilty of negligence in turning out the horse to graze where he might be exposed to danger from passing railroad trains was properly submitted to the jury. *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450. In a Wisconsin case the plaintiff, living about three-fourths of a mile from defendant's line, which he knew to be unfenced, permitted his cow to pasture in summer on a large tract of unenclosed land, extending from the neighborhood of his residence to the track; and she passed upon the track and was injured. It was held that upon these facts the question of contributory negligence, being open to doubt and debate, was for the jury. *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665. The court cannot say to the jury, as a matter of law, that permitting cattle to run at large is negligence which contributed to their injury, as it depends upon all the circumstances whether it was negligence and whether it contributed to the injury. *Cincinnati, &c. R. R. Co. v. Ducharme*, 4 Brad. (Ill.) 178. Where a railway company fails to fence its road, and stock is killed by its trains in a county where it is lawful for stock to run at large, the question of contributory negligence, in the owner permitting his stock to run at large, cannot arise. *Ohio & Mississippi R. R. Co. v. Fowler*, 85 Ill. 21. And where cattle are killed by a locomotive on a railroad running along unenclosed lands, but not at a railroad crossing, the fact that the cattle got upon the track from land adjoining that of the owner of the cattle, and upon which they had strayed, is no

defence to an action for damages against the railroad. *Kaes v. Mo. Pacific R. R. Co.*, 6 Mo. App. 397. The owner of animals, in allowing them to be at large on the range of unenclosed lands, is not chargeable with an unlawful act or an omission of ordinary care in keeping his stock, subject to the qualification, however, that animals which are unruly or dangerous are required to be restrained. The bare fact that the railway is unfenced will not render it liable for killing stock. *Blaine v. Chesapeake, &c. R. R. Co.*, 9 W. Va. 252. But if an animal is allowed to run at large in the vicinity of a railroad at a point where it was not fenced, and could not legally be fenced, the owner cannot recover for its injury. *Cincinnati, &c. R. R. Co. v. Street*, 50 Ind. 225. So, where cattle are running at large in an extra-hazardous place near a railway, the railway company is only liable for wanton and reckless neglect in their injury. *Williams v. Northern Pacific R. R. Co.*, 11 Am. & Eng. R. R. Cas. (Dak.) 421. In Nebraska, under the statute, a railway company is liable for stock killed upon its track while running at large in the night-time at a point where the company was required, but failed, to fence its track, notwithstanding stock is prohibited by statute from running at large in the night-time. *Burlington, &c. R. R. Co. v. Brinkman*, 14 Neb. 70. But in Iowa a railway company is released from the duty of exercising ordinary care toward animals required to be kept in an enclosure, which may have strayed upon its track, only when the animal is at large by the sufferance of the owner. *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497. But, generally, where it appears that the injured stock was permitted to run at large in violation of law, the question whether the owner of the stock has been guilty of contributory negligence is one of fact, to be determined by the jury from the circumstances of the case. *Ewing v. Chicago, &c. R. R. Co.*, 72 Ill. 25; *Rockford, &c. R. R. Co. v. Irish*, 72 Ill. 404. The better rule seems to be, where a railway company is not guilty of negligence in failing to protect its

But they may profess to carry only certain kinds of goods, and are liable as common carriers only according to such profession or the usages of their business.¹ Their liability commences with the delivery of the goods to them, and terminates with the delivery of the goods at their place of destination,² or where they are to be delivered at the *terminus* of their route to a connecting carrier.³ They

¹ *Tunnell v. Pettijohn*, 2 Harr. (Del.), 48; *Powell v. Mills*, 30 Miss. 231. The usages of the business and the representations which the carrier has made to the public, are invariably the guide to a proper decision as to the nature of the business. *Bennett v. Peninsular, &c.*, 8 B. Co., 6 C. B. 775; *Crosby v. Fitch*, 12 Conn. 410; *Williams v. Grant*, 1 Conn. 487; *Richards v. Gilbert*, 5 Day (Conn.), 415; *DeMott v. Laraway*, 14 Wend. (N. Y.) 225; *Bell v. Reed*, 4 Binn. (Penn.) 127; *Johnson v. Midland Ry. Co.*, 4 Exchq. 367; *Moriarty v. Harnden's Express*, 1 Daly (N. Y. C. P.), 227; *Michigan, &c. R. R. Co. v. McDonough*, 21 Mich. 162. In this case, railway companies were held not to be common carriers of live stock. See also *Gt. Western Ry. Co. v. Blower*, 1 L. R. 7 C. P. 655.

² *Mobile, &c. R. R. Co. v. Weiner*, 49 Miss. 725. In *Knight v. Providence, &c. R. R. Co.*, 13 R. I. 572, the defendant road received and paid the freight charges on certain lots of cotton shipped from Louisiana to Providence, and forwarded and delivered the cotton to the consignees. On delivery the cotton was found to be badly damaged by water, and the consignees claimed the right to recoup the damage from the bill of freight and charges of the defendant. It appeared that the defendant was not associated with the preceding carriers, and it did not appear where on the lines of transit the damage occurred. It was held that the recoupment could not be allowed. A carrier receiving goods marked for delivery beyond the end of his line is, in the absence of a special agreement, only responsible for safe carriage over his line and safe delivery to the next carrier. When several independent carriers successively receive goods for carriage, each is entitled to demand payment in advance or to a lien on the goods for the carriage price. In such cases each road is by

mercantile custom entitled to pay the back charges and to a lien on the goods for such charges, and for its own carriage price. If goods received from a prior carrier are apparently in good order, a carrier is not obliged to open the packages for further examination, but has, for the back charges paid a lien on the goods. *Schneider v. Evans*, 25 Wis. 241, 256; *Root v. Great Western R. R. Co.*, 45 N. Y. 524; *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88; *Nashua Lock Co. v. Worcester, &c. R. R. Co.*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 1; *Wells v. Thomas*, 27 Mo. 17; *Bissell v. Price*, 16 Ill. 408; *Bowman v. Hilton*, 11 Ohio, 303; *Lee v. Salter*, Lator Sup. (N. Y.) 163; *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457; *Harp v. Grand Era*, 1 Woods (U. S. C. C.), 184; *Western Trans. Co. v. Hoyt*, 69 N. Y. 230; *Mallory v. Burrett*, 1 E. D. S. (N. Y. C. P.) 234; *Bowman v. Hilton*, 11 Ohio, 303; *Monteith v. Kirkpatrick*, 3 Blatch. (U. S. C. C.) 279. After some parcels had been delivered to the consignees by the defendant, and found damaged, they directed the company to receive no more parcels of the lot. It was held that after such direction the company had no authority to receive the other parcels or to pay any back freight upon them.

³ *Millan v. Michigan Southern R. R. Co.*, 16 Mich. 791; *Lowell v. Wire Fence Co.*, 8 Allen (Mass.), 189; *Baltimore, &c. R. R. Co. v. Schumaker*, 29 Md. 176; *McDonald v. Western R. R. Co.*, 34 N. Y. 497; *Jacobs v. Hooker*, 1 Edm. Sel. Cas. (N. Y.) 472; *Britnall v. Saratoga, &c. R. R. Co.*, 32 Vt. 665; *Judson v. Western R. R. Co.*, 4 Allen (Mass.), 520; *Mullarkey v. Baltimore, &c. R. R. Co.*, 9 Phila. (Penn.) 514; *Grindle v. Eastern Express Co.*, 67 Me. 317; *Darling v. Boston, &c. R. R. Co.*, 11 Allen (Mass.), 295; *Dillon v. N. Y. Central R. R. Co.*, 1 Hilt. (N. Y. C. P.) 231; *Hunt v. N. Y. Cen-*

against a railway company for damages for loss caused by the latter's negligence, an instruction to the effect that the plaintiff could recover, if he showed by a preponderance of evidence that the loss resulted from the negligence of the defendant, was held defective in failing to instruct the jury that the plaintiff could not recover if his own negligence contributed to the loss.¹ In an action for the value of the plaintiff's horse, which escaped upon the defendant's railway from an adjoining field and was killed by a train, in consequence of a defect in the defendant's fence at that place, it was held that if it had appeared that the horse was breachy, and accustomed to jump or break lawful fences, and that the plaintiff, knowing these facts, turned him loose in the field adjoining the track, the jury might have found upon this evidence that the plaintiff was guilty of contributory negligence, though the court could not so hold as a matter of law.² It is held in some of the cases not to be conclusive evidence of negligence for the owner of cattle knowingly to permit them to run at large in a pasture next to a railroad track, where the fence is out of repair,³ and that whether it is or not is a question of

trespassers, and their owners as wrongdoers; and if they stray upon the track at a point where the company is not bound to fence, the latter is not liable unless the injury is inflicted by gross negligence, which may be said to be wilful. *McDonnell v. Pittsfield*, &c. R. R. Co., 115 Mass. 164; *Halloran v. N. Y. & Harlem R. R. Co.*, 2 E. D. S. (N. Y. C. P.) 257; *Fitch v. Buffalo*, &c. R. R. Co., 13 Hun (N. Y.), 668; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Bowman v. Troy*, &c. R. R. Co., 37 Barb. (N. Y.) 516; *Hance v. Cayuga*, &c. R. R. Co., 26 N. Y. 428. But holding the company liable for mere negligence, see *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Indianapolis*, &c. R. R. Co. v. *McKinney*, 24 Ind. 283; *Chicago*, &c. R. R. Co. v. *Morrow*, 67 Ill. 218; *Springfield*, &c. R. R. Co. v. *Andrew*, 68 Ill. 57.

¹ *McCormick v. Chicago, Rock Island & Pacific R. R. Co.*, 47 Iowa, 345.

² *Jones v. Sheboygan*, &c. R. R. Co., 42 Wis. 306.

³ *Evans v. St. Paul R. R. Co.*, 30 Minn. 489; *Ohio*, &c. R. R. Co. v. *Fowler*, 85 Ill. 21; *St. Louis*, &c. R. R. Co. v. *Ladd*, 36 Ill. 409; *Toledo*, &c. R. R. Co. v. *Ferguson*, 42 Ill. 449; *Corwin v.*

N. Y. & Erie R. R. Co., 13 N. Y. 42; *Brady v. Rensselaer R. R. Co.*, 1 Hun (N. Y.), 378. In this case, a cow was left in charge of a boy who drove her upon an unenclosed lot near the defendant's track, and left her for a short time, and she strayed upon the track and was killed by a train. It was held that the plaintiff was entitled to recover. *MILLER, P. J.*, said: "In *Bowman v. Troy*, &c. R. R. Co., 37 Barb. (N. Y.) 516, it was held that where one suffered his cow to be at large in a public street, and on the track of a railroad in a city, apparently alone and unattended, with no one to take charge of her, and where it did not appear that she was in the vicinity of the plaintiff's residence, or had been previously taken care of by him, or had escaped without his fault, or was lawfully travelling along the street, that he could not recover for injuries to the cow, happening through the negligence of the railroad company. This was an extreme case, and differs essentially from the case at bar, for here the cow was kept and fed in the plaintiff's stable, and only allowed to go out in charge of a boy employed for that purpose, and then not very far from the plaintiff's residence. The plaintiff had taken every precaution to

fact for the jury, in view of the circumstances.¹ But where the company is not in default as to the erection and repair of the fence,

guard against danger or accident, and it was the absence of the boy, without the knowledge or consent of the plaintiff, which enabled the cow to stray upon the defendant's track, where she was killed. There is a class of cases which holds that where the defendant was in default, the negligence of the owner in permitting the animal to run at large in the highway, or to trespass upon the premises of a neighbor, is not a defence. *Munch v. N. Y. Central R. R. Co.*, 29 Barb. (N. Y.) 647; *Suydam v. Moore*, 8 Barb. (N. Y.) 358. I am inclined to think that the judgment may be upheld within the principle here laid down, and that the temporary absence of the boy in charge of the cow was no defence. Even if it may properly be urged that there was a question of plaintiff's negligence in the case, I am not prepared to say that it was not for the jury to determine, under all the circumstances, whether there was negligence. But, independent of these considerations, I think that the case may properly be disposed of upon another ground. The defendant was bound to erect and maintain fences, and to construct and maintain cattle-guards at their crossing, near which the cow was run over. This had been done, but when the accident occurred the fence was temporarily removed, for the purpose of repairing the track, and there was evidence to show that the cattle-guard at the crossing was defective and insufficient, so that cattle could walk over the same. The defendant was clearly liable within the principle laid down in *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 49, by DENIO, J., that the design of the section was to require the railroad company to enclose their tracks with substantial fences, and to guard them by ditches called cattle-guards, and that one method provided for securing that object was the provision charging the companies which had disregarded the statute with damages for all injuries done to animals, and that it was not material from whence, or under what circumstances, the animals came upon the track, provided they were enabled to get there by the absence of cattle-guards. As was said in

Bradley v. N. Y. & Erie R. R. Co., 34 N. Y. 432, 'It is no excuse that the cattle, horses, etc., were at large in violation of law.' The exceptions to this general rule are, where it appears that the plaintiff drove his cattle on the road and left them there, or did some positive act increasing the danger of his cattle, or in a case where a party voluntarily permits his cattle to stray upon the railroad track. *Corwin v. N. Y. & Erie R. R. Co.*, ante; *Poler v. N. Y. Central R. R. Co.*, 16 N. Y. 480. As the case stood, there was no question of contributory negligence to submit to the jury; for even if the plaintiff had known of the defects of fence or cattle-guards, it would have been no defence." *Shepard v. N. Y. & Erie R. R. Co.*, 35 N. Y. 644; *Louisville, &c. R. R. Co. v. Whitrell*, 68 Ind. 297; *Knight v. Toledo, &c. R. R. Co.*, 24 Ind. 402; *Jeffersonville, &c. R. R. Co. v. Dunlap*, 29 Ind. 426; *Louisville, &c. R. R. Co. v. Cahill*, 63 Ind. 340; *Toledo, &c. R. R. Co. v. Cary*, 37 Ind. 172; *McCoy v. California, &c. R. R. Co.*, 40 Cal. 532; *Rogers v. Newburyport R. R. Co.*, 1 Allen (Mass.), 16; *Wilder v. Maine Central R. R. Co.*, 65 Me. 332. But see *Dayton, &c. R. R. Co. v. Miami County Infirmary*, 32 Ohio St. 566.

¹ *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360; *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450; *Estes v. Atlantic, &c. R. R. Co.*, 63 Me. 308; *Rockford, &c. R. R. Co. v. Irish*, 72 Ill. 404; *Pitzner v. Shinnick*, 39 Wis. 120; *Cairo, &c. R. R. Co. v. Woolsey*, 85 Ill. 370; *Curry v. Chicago, &c. R. R. Co.*, 48 Wis. 665; *Cincinnati, &c. R. R. Co. v. Ducharme*, 4 Brad. (Ill.) 178. So, too, the question whether or not the company was guilty of negligence in killing the cattle is one of fact to be found by the jury. *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497. In *Bulkley v. N. Y. & New Haven R. R. Co.*, 27 Conn. 479, the plaintiff had driven his cows home after dark in the evening, and left them in the highway in front of his house, intending to milk them there, and then put them into his enclosure, and while they were so left went into his house for a short time.

the contributory negligence of the plaintiff will defeat a recovery.¹ Every person is bound to use ordinary care to save his property from injury or destruction, and not having done so he cannot saddle upon another a loss resulting to it.²

SEC. 419. *Cattle straying upon a Highway.*—Nor, if a railway company has discharged its duty as to the erection of cattle-guards is it liable for injuries to cattle escaping upon its track from highways, when they have been turned into the highway by the owner, to graze or for other purposes, unless the injury is wilfully or wantonly inflicted;³ or, as held in some of the States, unless the injuries resulted from the negligence of the company.⁴ Depot-grounds, as a rule, cannot be fenced, at least without great inconvenience to the company and the public, and generally are not required to be; and where cattle straying upon the highway escape upon the track over such grounds, or at any point where the company is not required to erect a fence, it can only be held responsible for injuries wilfully inflicted;⁵ and the same is also true where it is impossible to fence

While he was gone they strayed away, and he searched for them until eleven o'clock at night. About ten o'clock at night they were run over by the defendants' cars. The railroad was about a mile from the plaintiff's house, and he had not searched in that direction. The suffering of cattle to run at large was forbidden by statute. The judge charged the jury that the plaintiff had a right to place his cows in the highway for the temporary purpose of milking them, and that if he left them there intending to milk them within a reasonable time and then to put them into his enclosure, and exercised ordinary care for the purpose of keeping them, he was not to be regarded as having suffered them to go at large within the meaning of the statute, and was not guilty of such negligence as would prevent his recovery. It was held, on motion of the defendants for a new trial, that the question of negligence was properly one of fact for the jury, but that, so far as it could be treated as involving any legal question, the law was properly stated in the charge. *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83; *Bennett v. Chicago, &c. R. R. Co.*, 19 Wis. 145; *Peoria, &c. R. R. Co. v. Champ*, 75 Ill. 577; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428.

¹ *Jeffersonville, &c. R. R. Co. v. Foster*, 63 Ind. 342; *Toledo, &c. R. R. Co. v. Thomas*, 18 Ind. 215; *Illinois Central R. R. Co. v. Goodwin*, 30 Ill. 117; *Ohio, &c. R. R. Co. v. Eaves*, 42 Ill. 288; *Flint, &c. R. R. Co. v. Lull*, 28 Mich. 510; *Fisher v. Farmers' Loan & Trust Co.*, 21 Wis. 73; *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665.

² *Illinois Central R. R. Co. v. Finnigan*, 21 Ill. 646; *Finch v. Central R. R. Co.*, 42 Iowa, 304; *Downing v. Chicago, &c. R. R. Co.*, 43 Iowa, 96.

³ *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428; *Darling v. Boston, &c. R. R. Co.*, 121 Mass. 118; *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 564; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349.

⁴ *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Indianapolis, &c. R. R. Co. v. McKinney*, 24 Ind. 283; *Springfield, &c. R. R. Co. v. Andrew*, 67 Ill. 218.

⁵ *Indianapolis, &c. R. R. Co. v. Oestel*, 20 Ind. 231; *Indianapolis, &c. R. R. Co. v. Crandall*, 58 Ind. 365; *Jeffersonville, &c. R. R. Co. v. Beatty*, 36 Ind. 15; *Pittsburgh, &c. R. R. Co. v. Bowyer*, 45 Ind. 496; *Flint, &c. R. R. Co. v. Lull*, 28 Mich. 510; *Blair v. Milwaukee, &c. R. R. Co.*, 20 Wis. 254; *Swearingen v. Missouri, &c. R. R. Co.*, 64 Mo. 73; *Morris v. St.*

goods are taken out of the possession of the carrier under a valid legal process, he is discharged from further liability in reference thereto,—as, where they are attached upon *mesne* process, levied upon, or replevied.¹ These are the only grounds upon which, independently of an express contract, the carrier can escape liability. At the common law, although goods are stolen by thieves, destroyed by fire, or injured through the wrongful act of third parties, the carrier is liable for their loss or for injury thereto.²

SEC. 425. Limitation of Liability by Contract.—In addition to the exemption from liability referred to in the last section, a carrier may by express contract limit his liability, provided the limitation is just and reasonable.³ But the limitation must be imposed by

¹ *French v. Star Union Trans. Co.*, 134 Mass. 238.

² *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent, & Co. Nav. Co.*, 5 T. R. 389; *Gosling v. Higgins*, 1 Camp. 451; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; and in *Fairchild v. Slocum*, 19 Wend. (N. Y.) 331; and in *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; and the opinion of COWEN, J., 21 Wend. (N. Y.) 198. See also *Crosby v. Fitch*, 12 Conn. 419; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539; *Klauber v. American Express Co.*, 21 Wis. 21; *Southern Express Co. v. Newby*, 36 Ga. 635. See also *Howe v. Oswego, & Co. R. R. Co.*, 56 Barb. (N. Y.) 121; and in 1869, *The Maggie Hammond*, 9 Wall. (U. S.) 435; *Harrell v. Owens*, 1 D. & B. (N. C.) L. 273; *Colt v. McMechen*, 6 John. (N. Y.) 60; *Moses v. Norris*, 4 N. H. 304; *Kemp v. Coughtry*, 11 John. (N. Y.) 107; *Ewart v. Street*, 2 Bailey (S. C.), 157; *Williams v. Grant*, 1 Conn. 487; *Turner v. Wilson*, 7 Yerg. (Tenn.) 340; *Campbell v. Morse*, Harp. (S. C.) 469; *Gordon v. Little*, 8 S. & R. (Penn.) 533. And this rule extends to carriers by water as well as by land. *Daggett v. Shaw*, 3 Mo. 264; *Harrington v. Lyles*, 2 N. & McCord (S. C.), 88; *Clark v. Richards*, 1 Conn. 54; *Emery v. Hersey*, 4 Me. 411; *Boyle v. McLaughlin*, 4 H. & J. (Md.) 291. And the destruction of goods by fire is not such an act of God, unless occasioned by lightning, as excuses the carrier's liability. *Graff v. Bloomer*, 9 Penn. St. 114; *Parker v. Flagg*, 26 Me. 181; *Miller v. Steam Navigation Co.*, 10

N. Y. 431. But the rule does not extend to the *time* of delivery. *Parsons v. Hardy*, 14 Wend. (N. Y.) 215. A common carrier is only relieved from liability for such injuries as *must* be attributed to the act of God, and not merely for such as *may* be so attributed. If the injury is not the direct effect of the act of God, but is such as might not have happened but for the negligence of man, the carrier is liable. Therefore, where a violent storm caused an unusually low tide, and the carrier's barge, lying at the pier which he used, was pierced by a projecting timber, covered at ordinary tides, and known by the carrier to exist, it was held that he was liable, notwithstanding that his individual negligence in leaving his barge there would not have produced the injury, without the concurrence of the act of God and the negligence of the wharf-builder. *New Brunswick Co. v. Tiers*, 24 N. J. L. 697.

³ *Farmers', & Co. Bank v. Champlain Trans. Co.*, 23 Vt. 186; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Baltimore, & Co. R. R. Co. v. Skeels*, 3 W. Va. 556; *Wallace v. Mathews*, 39 Ga. 617; *Michigan, & Co. R. R. Co. v. Heaton*, 31 Ind. 397, n.; *Express Co. v. Kountz*, 8 Wall. (U. S.) 341; *Lamb v. Camden, & Co. R. R. Co.* 2 Daly (N. Y. C. P.), 454; *Indianapolis, & Co. R. R. Co. v. Allen*, 31 Ind. 394; *Southern Exp. Co. v. Purcell*, 37 Ga. 103; *Evansville, & Co. R. R. Co. v. Young*, 28 Ind. 516; *McMillan v. Michigan Southern R. R. Co.*, 16 Mich. 69.

express contract, and as a rule cannot be imposed by a mere general notice,¹—at least unless actual knowledge of the terms of such notice is brought home to the shipper, at the time he enters into the contract, the burden of establishing which is upon the carrier.²

¹ *Dewart v. Loamer*, 21 Conn. 245; *Kimball v. Rutland, &c. R. R. Co.*, 26 Vt. 247; *Judson v. Western R. R. Co.*, 6 Allen (Mass.), 486; *Michigan, &c. R. R. Co.*, 6 Mich. 243; *Moses v. Boston, &c. R. R. Co.*, 32 N. H. 523; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Smith v. N. Carolina R. R. Co.*, 64 N. C. 235; *Georgia R. R. Co. v. Gann*, 68 Ga. 350; *Alabama, &c. R. R. Co. v. Little*, 2 Alb. L. J. 141; *State v. Townsend*, 37 Ala. 247; *South, &c. R. R. Co. v. Henlein*, 56 Ala. 368; *Clark v. Faxon*, 21 Wend. (N. Y.) 153; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *York Co. v. Central R. R. Co.*, 3 Wall. (U. S.) 107; *Wallace v. Mathews*, 39 Ga. 617; *Express Co. v. Kountze*, 8 Wall. (U. S.) 341; *Simon v. The Fung Shuey*, 21 La. An. 363; *Lamb v. Camden, &c. R. R. Co.*, 2 Daly (N. Y.), 454; *Indianapolis, &c. R. R. Co. v. Allen*, 31 Ind. 394; *Michigan, &c. R. R. Co. v. Heaton*, 31 Ind. 397, n.; *Baltimore, &c. R. R. Co. v. Skeels*, 3 W. Va. 556; *New Orleans, &c. Ins. Co. v. New Orleans, &c. R. R. Co.*, 20 La. An. 302. As to proof of such contract, see *Southern Exp. Co. v. Purcell*, 37 Ga. 103; *Evansville, &c. R. R. Co. v. Young*, 28 Ind. 516; *McMillan v. Michigan Southern, &c. R. R. Co.* 16 Mich. 79. In Pennsylvania a carrier may limit his liability by a general notice, but its terms must be clear and explicit; and the party with whom the carrier deals must be fully informed of the terms and its effects. The exception goes on the ground of a contract, express and implied; and where the notice was in the English language, and the passenger was a German, who did not understand the English language, it was held to be incumbent on the carrier to prove that the passenger had knowledge of the limitation; and if tickets, without anything more, are evidence of a special contract, yet they must be printed in a language which the passenger understands, or their terms must be explained to him. Cam-

den, &c. R. R. Co. v. Baldanf, 16 Penn. St. 67.

² *Farmers', &c. Bank v. Champlain Transportation Co.*, 23 Vt. 186; *Fillebrown v. Grand Trunk R. R. Co.*, 55 Me. 462; *Southern Exp. Co. v. Crook*, 44 Ala. 468; *Sager v. Portsmouth, &c. R. R. Co.*, 31 Me. 228; *Gott v. Dinsmore*, 111 Mass. 52; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 254; *Cole v. Goodwin*, 19 id. 251. In the last two cases it was held that notices placarded in conspicuous places in the offices, do not raise a presumption that the shipper knew of their contents. Nor is such assent established by the circumstance that the shipper accepted a receipt for the goods, in which such notice was written or printed, without dissent. *Railroad Co. v. Mfg. Co.*, 16 Wall. (U. S.) 319; *Southern Exp. Co. v. Armstead*, 50 Ala. 350. But as it is now universally known that neither individuals nor companies engaged as carriers undertake to assume the common-law liabilities of a common carrier, but issue receipts or give bills of lading containing certain limitations upon their liability, it seems to be generally conceded that the giving of such a receipt or bill of lading containing such limitations raises a presumption that the shipper knew of and assented to such limitations, and throws the burden upon him of proving his lack of knowledge thereof. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Squires v. New York Central R. R. Co.*, 98 Mass. 239; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; *Pemberton Co. v. New York Central R. R. Co.*, 104 Mass. 144; *Grace v. Adams*, 100 Mass. 505; *Gott v. Dinsmore*, 111 Mass. 45. In these cases, as indeed in all of them, a distinction is made between restrictions contained in a mere receipt for goods and a bill of lading; and while actual knowledge of and assent to the restrictions in the case of a receipt is necessary, and the mere circumstance that the receipt contains such restrictions is not conclusive that the plain-

But in most of the States, while the carrier may by special contract limit his liability as an insurer,—as, for the loss of the goods by fire, and other casualties which are not the result of his negligence,—yet he cannot restrict it so as to excuse himself from loss or damage resulting from the negligence of his servants or agents.¹ But in

tiff *knew* thereof, — *Gott v. Dinamore, ante*, — yet in the case of a bill of lading, as it embodies the contract between the parties, the plaintiff will not be permitted, in the absence of fraud, to show that he did not read the bill of lading or know of such restrictions. *Grace v. Adams, ante*; *Evansville, &c. R. R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *Farnham v. Railroad Co.*, 55 Penn. St. 53; *King v. Woodbridge*, 34 Vt. 565; *Steers v. Steamship Co.*, 57 N. Y. 1; *Huntington v. Dinamore*, 4 Hun (N. Y.), 66; *Sneider v. Adams Express Co.*, 63 Mo. 376; *Kallman v. Express Co.*, 3 Kan. 205; *Kirkland v. Dinamore*, 62 N. Y. 171; *Robinson v. Merchants' Despatch Co.*, 45 Iowa, 470; *Swindler v. Hilliard*, 2 Rich. (S. C.) 286; *McMillan v. Railroad Co.*, 16 Mich. 112; *Boorman v. American Express Co.*, 21 Wis. 154; *Steele v. Townsend*, 37 Ala. 247. But in Illinois the rule is otherwise; and the mere acceptance of a receipt containing limitations upon the carrier's liability does not raise any presumption that the bailor knew thereof, and the carrier assumes the burden of establishing such knowledge and assent. *Adams Express Co. v. Haynes*, 42 Ill. 89; *United States Express Co. v. Haynes*, 67 Ill. 137; *Anchor Line v. Dator*, 68 Ill. 369; *Adams Express Co. v. Stettaners*, 61 Ill. 184; *Field v. Chicago, &c. R. R. Co.*, 71 Ill. 458; *Woodruff v. Sherrard*, 16 N. Y. S. C. 322; *Madan v. Sherrard*, 73 N. Y. 329; *Merchants' Despatch Co. v. Theilbar*, 86 Ill. 71; *Adams Express Co. v. King*, 3 Ill. App. 316. In *Merchants' Despatch Co. v. Cornforth*, 3 Cal. 280, a common carrier orally contracted, in winter, to transport a lot of oranges, lemons, and bananas in a refrigerator-car through from New York to Denver without change. After the fruit was loaded in the car, the carrier delivered to the owner's agent a bill of lading containing a printed condition not to be liable for injury occasioned by

the weather, over which was written the words "general release." The fruit reached Denver in an ordinary box-car, and badly frozen. It was held that the carrier was liable for the damages. *Morrison v. Phillips, &c. Construction Co.*, 44 Wis. 405; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Michigan, &c. R. R. Co. v. Boyd*, 91 Ill. 268; *American Express Co. v. Spellman*, 90 Ill. 455; *Merchants' Despatch Co. v. Leyser*, 89 Ill. 43; *Merchants' Despatch Co. v. Jaesting*, 89 Ill. 152.

¹ *Rantoul v. N. Y. Central R. R. Co.*, 17 Fed. Rep. 505; *Branch v. Wilmington, &c. R. R. Co.*, 88 N. C. 573; *Georgia, &c. R. R. Co. v. Gann*, 68 Ga. 350; *Mitchell v. Georgia R. R. Co.*, 68 Ga. 644; *Chicago, &c. R. R. Co. v. Mass*, 60 Miss. 1003; *Chicago, &c. R. R. Co. v. Abela*, 60 Miss. 1017; *Little Rock, &c. R. R. Co. v. Talbot*, 39 Ark. 523; *Ohio, &c. R. R. Co. v. Selby*, 47 Ind. 471; *Berry v. Cooper*, 28 Ga. 543; *Reno v. Hogan*, 12 B. Mon. (Ky.) 63; *Penn. R. R. Co. v. Butler*, 57 Penn. St. 335; *Ashmore v. Penn. R. R. Co.*, 28 N. J. L. 180; *Southern Express Co. v. Moon*, 39 Miss. 822; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; *Perry v. Thompson*, 98 Mass. 249; *Judson v. Western R. R. Co.*, 6 Allen (Mass.), 486; *Pemberton County v. New York Central R. R. Co.*, 104 Mass. 144; *Grace v. Adams*, 100 Mass. 505; *Medfield School District v. Boston, &c. R. R. Co.*, 102 Mass. 552; *New Orleans, &c. R. R. Co. v. Faler*, 58 Miss. 511; *Shriver v. Sioux City, &c. R. R. Co.*, 24 Minn. 506; *Louisville, &c. R. R. Co. v. Brownlee*, 14 Bush (Ky.), 590; *Chicago, &c. R. R. Co. v. Hale*, 2 Ill. App. 150; *Kansas Pacific R. R. Co. v. Reynolds*, 17 Kan. 251; *United States Exp. Co. v. Bachman*, 28 Ohio St. 144; *Clark v. St. Louis, &c. R. R. Co.*, 64 Mo. 440; *Camp v. Hartford, &c. Steamboat Co.*, 43 Conn. 333; *Bank of Kentucky v. Adams*

New York and some other States it has been held that the carrier may, by an explicit special contract, limit his liability against loss or damage resulting even from the gross or wilful negligence of his agents or servants.¹ But, as before stated, in most of the States, while the carrier may impose reasonable limitations upon his liability, he cannot by any provision, however explicit or direct, screen himself from liability for loss or injury resulting from his own or his servants' negligence. The only ground, however, upon which the right of a carrier to limit his liability by contract, in any manner he pleases, can be denied, is that by reason of the public character of his business such contracts are opposed to public policy; and in view of the variety and extent of the interests involved, it seems to us that this position is well grounded, and it is certainly sustained by the great weight of American authority.

SEC. 426. **Duty to Receive Goods.**—A railway company, like any other common carrier, is bound to receive from all persons and carry all such goods as it professes to carry which are tendered to it for conveyance on its usual route, and for which the freight charges are offered, treating all persons alike, *cæteris paribus*, upon the same terms and at like rates,² and is liable to an action for refusing to receive and carry. The duty to afford facilities for carriage extends to the carriage of goods for other carriers.³ But it is not bound to receive goods which it does not profess to carry,⁴ nor to carry except upon usual trains,⁵ nor unless the goods are delivered in season for loading upon such usual trains.⁶ Nor is it bound to receive goods which are so defectively packed that their

Express Co., 93 U. S. 174; American Westcott v. Fargo, 61 N. Y. 542; Poucher Exp. Co. v. Shier, 55 Penn. St. 140; v. N. Y. Central R. R. Co., 49 N. Y. 268; Southern, &c. R. R. Co. v. Henlim, 52 Spinatti v. Atlas S. S. Co., 81 N. Y. 71; Ala. 606; Nashville, &c. R. R. Co. v. Bissell v. N. Y. Central R. R. Co., 25 Johnson, 6 Heisk. (Tenn.) 271; Penn. N. Y. 442; Baltimore, &c. R. R. Co., 1 R. R. Co. v. Butler, 57 Penn. St. 335; W. Va. 87; Farmers', &c. Bank v. Penn. R. R. Co. v. McClosky, 23 Penn. Champlain Trans. Co., 23 Vt. 186. St. 536; Farnham v. Camden, &c. R. R. Co., 55 Penn. St. 53; American Exp. Co. v. Sands, 55 Penn. St. 53; Evansville, &c. R. R. Co. v. Young, 28 Ind. 516; Seller v. Pacific, &c. R. R. Co., 1 Oregon, 409; Kallman v. United States Exp. Co., 3 Kan. 205; Davidson v. Graham, 2 Ohio St. 131; Southern Express Co. v. Moon, 39 Miss. 822; Stedman v. Western Trans. Co. 48 Barb. (N. Y.) 97; Dorr v. New Jersey Steam Nav. Co., 4 Sandf. (N. Y.) 97.

¹ Mangin v. Dinmore, 56 N. Y. 168; Rayd. 652.

Westcott v. Fargo, 61 N. Y. 542; Poucher Exp. Co. v. Shier, 55 Penn. St. 140; v. N. Y. Central R. R. Co., 49 N. Y. 268; Spinatti v. Atlas S. S. Co., 81 N. Y. 71; Bissell v. N. Y. Central R. R. Co., 25 N. Y. 442; Baltimore, &c. R. R. Co., 1 W. Va. 87; Farmers', &c. Bank v. Champlain Trans. Co., 23 Vt. 186.

² Cranch v. London, &c. Ry. Co., 14 C. B. 225; Garton v. Exeter, &c. Ry. Co., 1 B. & S. 112.

³ Sec. 204, p. 587.

⁴ McManus v. Lancashire, &c. Ry. Co., 4 H. & N. 327.

⁵ Donahoe v. London, &c. Ry. Co., 15 W. R. 772.

⁶ Palmer v. London, &c. Ry. Co., L. R. 1 C. P. 588; Garton v. Bristol, &c. Ry. Co., ante; Lane v. Cotton, 1 Ld.

condition will entail upon the company extra care and extra risk;¹ nor dangerous articles, as nitro-glycerine, dynamite, gunpowder, aqua-fortis, oil of vitriol, matches, etc.² We have already treated the subject of undue preference, etc.³

SEC. 427. Delivery to the Company.—The liability of a railway company as a carrier attaches when the goods are delivered to it for carriage, and, except where it collects the goods, they are not received by it until they are delivered at its usual place of receiving goods, to some person authorized to receive them.⁴ Merely leaving the goods at the station, without the acquiescence or knowledge of some person authorized to act for it, does not constitute a delivery,⁵ nor even placing them upon one of the company's cars.⁶ It is not necessary, however, in order to constitute a delivery, that a receipt should be given for the goods, or that they should be entered on a way-bill.⁷ If any servant authorized by the company, expressly or impliedly, to receive goods for shipment acquiesces in their being left at the station, this constitutes a delivery to the company.⁸ When the goods are received by the carrier, without any stipulation as to risk or rate of carriage, a mere ordinary contract for carriage is entered into, and the common-law liability applies to the carrier; but if the company attaches any special condition to the receipt of the goods, a special contract is created, and in that case it must be sued upon the special contract, and not as common carrier.⁹ If the contract is in writing, it must be proved and put into the case.¹⁰

SEC. 428. Right to demand Advance Freight.—A railway company, as well as any other common carrier, has a right to demand that its charges for transporting goods shall be paid in advance;¹¹ and it is not obliged to receive goods for transportation unless such

¹ *Munster v. South-Eastern Ry. Co.*, 4 C. B. N. s. 676; *Hart v. Baxendale*, 16 L. T. N. s. 396.

² See *ante*, p. —.

³ Page 563, *et seq.*

⁴ *Bergheim v. Gt. Eastern Ry. Co.*, L. R. 3 C. P. D. 22; *Evershed v. London, &c. Ry. Co.*, L. R. 3 Q. B. D. 134.

⁵ *Selway v. Hollaway*, 1 Ld. Rayd. 46.

⁶ *Lovett v. Hobbs*, 2 Shaw, 127; *Leigh v. Smith*, 1 C. & P. 640.

⁷ *Chitty and Temple on Carriers*, 30.

⁸ *Winkfield v. Packington*, 2 C. & P. 599; *Long v. Horne*, 1 C. & P. 610; *Taff Vale Ry. Co. v. Giles*, 2 E. & B. 823;

Rogers v. Long Island R. R. Co., 2 Lans. (N. Y.) 269. But if they are received to be shipped according to future orders, the carrier is only a warehouseman until the order to ship is given. *Wade v. Wheeler*, 3 Lans. (N. Y.) 201.

⁹ *White v. Gt. Western Ry. Co.*, 2 C. B. N. s. 7; *Harris v. Midland Ry. Co.*, 25 W. R. 63.

¹⁰ *Robinson v. Gt. Western Ry. Co.*, 25 L. J. C. P. 123.

¹¹ *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372; *Barnes v. Marshall*, 16 Q. B. 785.

charges are paid, *if demanded*.¹ But as the general custom is to receive and collect for carriage upon delivery to the consignee, unless advance freight is demanded when the goods are tendered for carriage this right is waived, and it can only rely upon its lien upon the goods for payment, or upon the responsibility of the consignee after delivery.² Where goods are accepted for carriage without requiring the charges to be paid in advance, the company is treated as waiving the right to pre-payment, and can only recover when the goods are delivered. But it has a lien upon the goods for its charges for carriage,³ or it may deliver the goods and sue for its charges.⁴ If, without the fault of the carrier, or by any of the excepted casualties, the goods are lost, the company is still entitled to recover its charges for carriage, unless the agreement is for payment when

¹ Wyld v. Pickford, 8 M. & W. 448; Botson v. Donovan, 4 B. & Ald. 28.

² Barnes v. Marshall, *ante*.

³ Wilson v. Gd. Trunk R. R. Co., 56 Me. 60; Rucker v. Donovan, 18 Kan. 231; Langworthy v. N. Y., & C. R. R. Co., 2 E. D. S. (N. Y. C. P.) 195; Barker v. Hanens, 17 John. (N. Y.) 234; Bowman v. Hilton, 11 Ohio, 303; Hunt v. Haskell, 24 Me. 339; Sullivan v. Park, 33 Me. 438. And this lien must be satisfied before they can be taken out of its possession, either by the consignor who stops them *in transitu* or an officer who attaches them upon *mesne* process or execution. Chandler v. Belden, 18 John. (N. Y.) 157; Raymond v. Tyrone, 17 How. (U. S.) 53. If part are delivered, the lien remains upon the balance. Lane v. Old Colony R. R. Co., 14 Gray (Mass.), 143; Fuller v. Brady, 25 Penn. St. 120; Briggs v. Martin, 13 B. Mon. 239. This right of lien exists although they were delivered to it by a wrongful owner, and are claimed by the rightful owner. Yorke v. Grenough, 2 Ld. Raym. 367. The common-law right is a specific lien; that is, a right to detain for the carriage of the particular goods, and not for those goods and any other balance the owner may owe for the carriage of other goods. Butler v. Woolcott, 2 B. & P. 64. The latter right, called a general lien, can only be supported by proof of general usage, special agreement, or mode of dealing, supporting such a claim. Rushforth v. Hadfield, 6 East, 519; 7 id. 224;

Wright v. Snell, 5 B. & Ald. 350. And the fact that a carrier has a right of general lien against a consignor does not entitle him as against the consignee to retain the goods in respect of a general balance due from the consignor. Butler v. Woolcott, *ante*. Nor can a general lien as against the consignee affect the right of the consignor to stop the goods *in transitu*, and claim their return upon paying the specific claim for carriage. Oppenheim v. Russell, 3 B. & P. 42; Jackson v. Nichol, 7 Scott, 577; and see notes to Chase v. Westmore, Tu. L. C., Merc. L. 690, *et seq.* A right of lien is defeated by giving up possession of the goods; or by dealing with them in such a manner as to amount to a conversion of them; and if once waived it cannot afterwards be resumed. Kruger v. Wilcox, Tu. L. C., Merc. L. 676. But if possession was obtained by fraud, it seems the carrier's lien would revive on regaining possession of the goods. Wallace v. Woodgate, Ry. & M. 194. A right of lien confers no right of sale upon the person holding such lien, though the retention of the chattels may be attended with expense. Thames Ironworks Co. v. Patent Derrick Co., 1 J. & H. 93. A demand for the sum actually due for tolls is a condition precedent to the right to sell. Field v. Newport, &c. Ry. Co., 3 H. & N. 409; North v. London, &c. Ry. Co., 14 C. B. N. s. 182.

⁴ Bastard v. Bastard, 2 Shaw, 81.

the goods have been transported to their destination; in which case, a recovery can only be had for such as finally reach their destination.¹

SEC. 429. Duty of Company to Carry Safely.—The first duty of a carrier is to carry safely.² Therefore it is the duty of a railway company during the transit to use all the diligence and care towards the goods entrusted to it that prudent and cautious men in the like business usually employ for the safety and preservation of the property confided to their charge.³ For this purpose it must have its stations and yards in a safe condition, so that those who use them by the company's invitation may do so without injury to themselves or the traffic they bring or remove.⁴ It must provide proper cars and vehicles for the transportation, with all reasonable equipments and servants to take care of them.⁵ It must have its through communications so arranged as not to cause undue delay, its permanent way in such a state as not, by shaking, to make the chafing or wear and tear of the goods unduly severe, and it must have proper coverings to protect the goods from damage by exposure.

SEC. 430. Proper Carriages to be Provided.—A railway company is bound to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry;⁶ and it will be liable for injury from the defects of a car, even if it belongs to another company, if it adopts it for the purposes of its own transit.⁷ But it is sufficient if the company provides a carriage which, without extraordinary accident, will probably perform the journey.⁸

SEC. 431. Goods Injurious to Each Other not to be Stowed Together.—It must take care not to forward in the same car goods

¹ Abbott on Shipping, 409, *et seq*; Dig. 14, 2, 10. See *Andrew v. Moorhouse*, 5 Taunt. 435; 1 Marsh. 122; *Osgood v. Groning*, 2 Camp. 466; *Cook v. Jennings*, 7 T. R. 381; *Mashiter v. Buller*, 1 Camp. 81; *s. p. Clark v. Druisina*, 1 Marsh. 123; *Blakeley v. Dixon*, 2 B. & P. 321; *Cargo ex Galam*, 2 Moore, P. C. C. N. s. 216; 33 L. J. Adm. 97; *Vlierboom v. Chapman*, 13 M. & W. 230; *Hunter v. Prinsep*, 10 East, 378; *Swett v. Black*, 2 Sprague (U. S. C. C.), 49; *The Excelsior*, 2 Ben. (U. S. C. C.) 434; *Seers v. Linseed*, 1 Cliff. (U. S. C. C.) 68; *Donahoe v. Kettell*, 1 Cliff. (U. S. C. C.) 135; *Hart v. Shaw*, 1 Cliff. (U. S. C. C.) 358; *Fox v. Nott*, 6 H. & N. 630. See also *Shepherd v. De Bernales*, 13 East, 567; *Penrose v.*

Wilks, Abbott on Shipping, 415; *Tapley v. Martin*, 8 T. R. 445; *Christie v. Rowe*, 1 Taunt. 300.

² *Great Northern Ry. Co. v. Taylor*, L. R. 1 C. P. 385.

³ *Beal v. South Devon Ry. Co.*, 3 H. & C. 337.

⁴ *Booth v. North-Eastern Ry. Co.*, 36 L. J. Ex. 83.

⁵ *Beckford v. Crutwell*, 5 C. & P. 242.

⁶ *Lyon v. Mella*, 5 East, 428; *Shaw v. York, &c. Ry. Co.*, 13 Q. B. 347.

⁷ *Combe v. London, &c. Ry. Co.*, 31 L. T. N. s. 613.

⁸ *Amies v. Stevens*, 1 Str. 128; *Great Western Ry. Co. v. Blower*, 41 L. J. C. P. 263; L. R. 7 C. P. 655, *per Willes, J.*

which from their proximity would be likely to damage each other: thus, they would be liable for injury to flour caused by the effluvia of spirits of turpentine, or for damage to cambric goods caused by sulphuric acid if stowed near together.¹ So it is assumed if goods were placed in a car and injured by the effluvia of goods previously carried in the same car. If goods are of a class likely to be injured by coming in contact with other goods, the fact should be communicated to the company, otherwise they will not be liable.² The company must use the ordinary precautions to lessen as much as possible the ordinary wear and tear of goods, — as, if a cask containing any species of liquid leaks on the journey, it must take steps to stop the leak when it comes to their knowledge, — otherwise they will be liable for the loss;³ and though not liable for ordinary deterioration of goods in quantity or quality from inherent infirmity, yet if the goods require airing or ventilation during the journey, for the purposes of preservation, as fruits and other such articles sometimes do, they must do what is reasonably within their power for this purpose;⁴ and in the case of animals on a long journey, it may be necessary to feed them.⁵

SEC. 432. The Directions of the Owner must be Obeyed.—It must obey the directions of the owner of the goods during the transit; and a person who delivers goods to a railway company to carry, directed to a particular place, may countermand the direction at any moment of the transit and demand back his goods, at least on payment of the carriage, unless perhaps where the unpacking and delivering would be productive of much inconvenience.⁶

SEC. 433. When the Right to Stop in Transitu Exists.—If the seller has dispatched goods on credit to the buyer, and before they reach their destination the buyer becomes insolvent, the law, in order to prevent the loss that would happen to the seller, allows him in many cases to countermand the delivery before the arrival of the goods at their place of destination and to cause them to be re-delivered to himself.⁷ This right exists only *where the goods are sold on credit, and the consignee is insolvent, and the goods are still in transit*.⁸ If the goods have gone into the possession, actual or con-

¹ *Alston v. Herring*, 11 Ex. 822.

² *Hutchinson v. Guion*, 5 B. C. N. s. 149.

³ *Beck v. Evans*, 16 East, 244.

⁴ *Davidson v. Gwynne*, 12 East, 381.

⁵ *Taff Vale Ry. Co. v. Giles*, 23 L. J. Q. B. 43; *Great Northern Ry. Co. v. Swaffield*, L. R. 9 Ex. 132.

⁶ *Scotthorn v. South Staffordshire Ry. Co.*, 8 Ex. 341.

⁷ *Lickbarrow v. Mason*, 1 Smith's L. C. 699 (Eng. ed.).

⁸ *Story on Bailment*, § 581; *Winslow v. Vt. Central R. R. Co.*, 42 Vt. 700; *Hedges v. Hudson River R. R. Co.*, 6 Robt.

structive, of the consignee,¹ the right is merely an equitable lien given and enforced for the purposes of substantial justice.² The right is confined to the unpaid vendor³ or his factor or agent, who virtually stands in that relation to the goods.⁴ But a mere surety for the goods,⁵ or one who claims a lien upon them for money or labor expended thereon, has no such right.⁶ The right is not lost by a part payment of the purchase money,⁷ or an acceptance of the consignee for a part or the whole of the purchase money.⁸ A sale of the goods by the consignee while they are in transit does not defeat the right.⁹

SEC. 434. Termination of the Transit.—The question as to whether the transit is ended is one of fact in each case,¹⁰ and, according to the case last cited, it is of the very essence of the doctrine of stoppage *in transitu* that the goods should be in the custody of some third person intermediate between the seller and the buyer.¹¹

SEC. 435. What is Actual Delivery.—The actual delivery of the goods to the vendee or his agent, which puts an end to the *transitus* or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods, or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself; or it may be by the vendee's taking possession, by himself or agent, at some point short of the original intended place of destination.¹² If the vendee take them out of the possession of the carrier into his own before their arrival at their destination, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end; though, in the case of the

(N. Y. Supr. Ct.) 119; *Solomon v. Phila., &c. S. Co.*, 2 Daly (N. Y. C. P.), 104.

¹ *Mills v. Ball*, 2 B. & P. 461; *Whitehead v. Anderson*, 9 M. & W. 518; *London, &c. Ry. Co. v. Bartlett*, 7 H. & N. 400; *Foster v. Frampton*, 6 B. & C. 107; *Oppenheim v. Russell*, 3 B. & P. 54; *Blum v. Marks*, 21 La. An. 458; *Howe v. Stewart*, 40 Vt. 145; *Wenger v. Bernhardt*, 55 Penn. St. 300; *Thompson v. Baltimore, &c. R. R. Co.*, 28 Md. 396; *Schmertz v. Dwyer*, 53 Penn. St. 335.

² *Tucker v. Humphrey*, 4 Bing. 519.

³ *Kinloch v. Craig*, 3 T. R. 783.

⁴ *Feise v. Wray*, 3 T. R. 783; *Van Casleet v. Booker*, 18 L. J. Exchq. 17;

The Tigress, 32 L. J. Adm. 97; *Newson v. Thornton*, 6 East, 17.

⁵ *Siffken v. Wray*, 6 East, 371.

⁶ *Street v. Pym*, 1 East, 4.

⁷ *Hodgson v. Say*, 7 T. R. 446.

⁸ *Edwards v. Brewer*, 2 M. & W. 375; *Kinloch v. Craig, ante*; *Feise v. Wray, ante*.

⁹ *Ex parte Cooper*, L. R. 11 Ch. Div. 68.

¹⁰ *Schotsman v. Lancashire, &c. Ry. Co.*, L. R. 2 Ch. 332.

¹¹ See also *Gibson v. Carruthers*, 8 M. & W. 323; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Barnardston v. Strong*, L. R. 3 Ch. 533.

¹² *James v. Griffin*, 2 M. & W. 633.

absence of the carrier's consent, it may be a wrong to him for which he would have a right of action.¹

SEC. 436. *Carrier may be Agent to Receive and Determine the Transitus.* — A carrier may be the agent of the purchaser, and by changing his character from carrier to such agent may determine the *transitus*; and the most difficult cases are those where, the actual journey being over, the goods still remain under the control of the carrier in his warehouse. Then the question becomes, does he hold them as carrier, or as warehouseman and agent for the consignee? This depends upon the intention of the carrier and consignee, and whether or not they have, expressly or by implication, entered into a new contract, distinct from the original contract for carriage, that the carrier is to hold them for the consignee as his agent, for the purpose of custody on his account, and subject to some new or further order to be given by him.²

If there is any doubt whether the consignee has converted the carrier into his agent for custody, or for a new purpose other than carriage, the intention of the parties must be gathered from their various acts. The carrier cannot, without the consent of the consignee, convert himself into a warehouseman for the consignee, so as to terminate the *transitus*.³ Neither would any act of constructive taking possession by the consignee, short of actual removal out of the possession of the carrier, unless accompanied with circumstances to denote that the carrier assented to hold them for the consignee, in the nature of an agent for custody, determine the *transitus*.⁴ A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at is not enough to bring them into the possession, actual or constructive, of the purchaser.⁵ If the purchaser, having no warehouse of his own, is in the habit of using the warehouse of his carrier as his own, and making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end when the goods arrive at the customary place of deposit, although they may immediately afterwards receive a fresh destination.⁶

¹ *Whitehead v. Anderson*, 9 M. & W. 534.

² *Wentworth v. Outhwaite*, 10 M. & W. 450.

³ *Bolton v. Lancashire, &c. Ry. Co.*, L. R. 1 C. P. 481; *Ex parte Barrow, Re Worsdell*, 25 W. R. 466; *James v. Griffin*, 2 M. & W. 623.

⁴ *Whitehead v. Anderson*, 9 M. & W. 535.

⁵ *Coventry v. Gladstone*, L. R. 6 Eq. 44.

⁶ *Scott v. Pettit*, 3 B. & P. 469; *Rowe v. Pickford*, 8 Taunt. 83; *Allan v. Gripper*, 2 Cr. & J. 218; *Foster v. Frampton*, 6 B. & C. 107.

SEC. 437. Delivery of Part, when Delivery of the Whole.— Different opinions have been held on the question of whether a part delivery is a constructive delivery of the entire goods comprised in the contract, so as to put an end to the right to stop *in transitu* as to the whole of the goods. At one time it was held that there was a constructive delivery of the whole. This, however, has since been questioned and dissented from, and it has been said only to be a constructive delivery of the whole where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole.¹

SEC. 438. Transit once Ended, Right cannot Revive.— If the transit be once at an end it cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and ulterior destination.²

SEC. 439. Notice must be given in Due Time to be Effective.— A company are entitled to express notice from a consignor before they will be liable for not stopping goods *in transitu*. To make such a notice effective it must be given at such a time, and under such circumstances, that the company may by the exercise of reasonable diligence communicate it to their servants in time to prevent the delivery of the goods to the consignee.³ Notice by the vendor or his particular agent or by his general agent, if the act of the agent is afterwards recognized and confirmed by the principal, will be sufficient to stop the goods.⁴ But notice by an unauthorized person will not be effectual unless ratified by the vendor within the time when he might himself have exercised the right.⁵ Where goods are stopped *in transitu*, the carrier is of course entitled to demand and have his hire for the carriage of such goods before giving them up. He cannot, however, as we have previously seen, claim to retain them as a lien for a general balance due from the consignee.

SEC. 440. Rival Claimants.— Sometimes a railway company is placed in an awkward position by claims upon the goods by persons other than and adverse to the party who delivered them. For instance, they may be followed and claimed by the sender's land-

¹ Bolton v. Lancashire & Yorkshire Ry. Co., L. R. 1 C. P. 431; *Ex parte* Cooper, *Re* M'Laren, L. R. 11 Ch. D. 68; *Ex parte* Gibbes, *Re* Whitworth, L. R. 1 Ch. D. 101.

² Valpy v. Gibson, 4 C. B. 837.

³ Whitehead v. Anderson, 9 M. & W. 518.

⁴ Northey v. Field, 2 Esp. 613; Bailey v. Culverwell, 8 B. & C. 448.

⁵ Bird v. Brown, 4 Exchq. 786.

lord for rent, or by a sheriff's officer under a writ of execution ; or the consignor may have stolen the goods, and they may be claimed by the person from whom they were stolen ; or the consignor may have become bankrupt, and the goods may be claimed by his trustee as fraudulently removed.

Ordinarily, the person who delivers the goods to the company is to be treated by them as the owner, and in general his title may not be disputed by the company, or a *jus tertii* or adverse title be set up, but the goods must be delivered according to his directions, without putting him to proof of his title.¹ That applies, however, only where such adverse claim is not asserted by the superior claimant to the sender, but merely by the carrier's own motion. But should the goods be the property of a third person, who is also entitled to the possession of them, and while in the custody of the company such owner should demand possession, they would be justified in delivering the goods to him.² Nor are they precluded by reason of having received goods from a particular individual from setting up the title of a third party, really entitled thereto, who has claimed and received the goods.³ In the case last cited the court said : " The defendants were common carriers ; and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question ; it was raised by the demand of the real owner before the defendants had parted with the goods. The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample grounds for so holding." Still, the company have upon them the burden and risk of ascertaining who is the real owner, which, in the complication of mercantile transactions, is not always an easy task. Where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril ; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods.⁴ But a company may compel rival claimants to establish their title by interpleader.

¹ *Laclonch v. Towle*, 3 Esp. 115.

² *Taylor v. Plumer*, 3 M. & S. 562.

³ *Sheridan v. New Quay Co.*, 4 C. B.

N. S. 618.

⁴ *Story on Bailments* § 582.

SEC. 441. Common Carriers' Liability only Determined by a Delivery.—A common carrier engages not only safely to carry, but he also engages to carry with reasonable dispatch and safely to deliver the goods to the consignee.¹ It is immaterial whether there is

¹ *Bodenham v. Bennett*, 4 Price, 31; *Duff v. Budd*, 3 B. & B. 177. The uniform course of business between the defendant and certain despatch companies contracting to carry cotton from Memphis to Jersey City, to be there shipped for Liverpool, was for the defendant, on arrival of the cotton, to give notice thereof to the companies' agent in New York, named in the way-bill as consignee, whose duty it then was to obtain a permit from the steamship company for delivery thereto, and to deliver the permit to the defendant, on receipt of which the defendant would deliver the cotton on lighters to the proper vessel. On arrival of the lot in question, the defendant gave prompt notice to the proper agent, and vainly urged him to obtain the permit. It was held that the defendant was not liable for the delay in delivery. *Whitworth v. Erie R. R. Co.*, 87 N. Y. 413. By a contract with a steamship company, one was entitled to ship meat from New York to Liverpool in a space assigned to him, and in which he had constructed a refrigerator. He sent an agent to take care of the meat. He shipped under the contract a quantity of beef and mutton, but the mutton was omitted from the bill of lading. It was held that such omission did not relieve the company from liability; which was substantially that of a common carrier. A provision in such bill of lading exonerating the company from such loss as might result from the decay of the meat was held to refer only to its tendency in and of itself to decay; and not to relieve from loss occasioned by its own negligence or misconduct. In his action to recover for the loss of such meat, it appeared that he furnished ice enough to preserve the meat five days longer than the eleven usually required for the voyage; that two days after sailing, when the steamer was 490 miles from New York and 200 from Halifax, and the wind favorable for her return, the propeller-shaft broke; that the captain knew it would take at least twenty-two days to complete the voyage by sail; that the agent informed him the meat could not be preserved for that time; that fearing the danger of the coast, he proceeded under sail and arrived at Liverpool in thirty-six days. It was held: 1. That the jury were properly instructed that if they were satisfied that the captain was thoughtless or reckless in endeavoring to continue the voyage, the plaintiff was entitled to recover, and a verdict for him would not be disturbed. 2. That he could recover for meat taken for the ship's use as well as for that thrown overboard. 3. Also the amount of freight which he had been required to pay before the voyage began. 4. That the agent's statement to the captain as to the condition of the meat and the inability to preserve it for so long a time is admissible. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107. It is the duty of a railroad company, engaged as a common carrier, to transport freight without unnecessary delay. A delay of twenty-four hours at a station on the way is an unnecessary one unless excused. That the company needed its rolling-stock for the purpose of conveying passengers is not a sufficient excuse. *Ormsby v. Union Pacific R. R. Co.*, 2 McCrary (U. S. C. C.), 48. A railroad company must receive and carry for express companies the articles known as express matter, without discrimination in favor of itself or any other express company. The rule is that if the railroad company engages in the business of express carriage itself, it must do so on terms of perfect equality with all other express carriers. *Southern Express Co. v. Memphis, &c. R. R. Co.*, 2 McCrary (U. S. C. C.), 570. In a New York case a company contracted to transport on A.'s account 300 bales of cotton "on board steamer Minnesota or Nevada for Liverpool." The cotton did not arrive at New York from Mobile until Oct. 26, when the Minnesota had a full cargo accepted and ready for loading, she being advertised to sail Oct. 27. The cotton, being sent by

negligence or not: his warranty as an insurer is broken by non-delivery.¹ Accordingly, a railway company's extraordinary liability

the Nevada, arrived at Liverpool a week after the Minnesota. Meanwhile the price had fallen. It was held that there was no breach of contract, and that the company was not required to notify A., on the arrival at New York, that the cotton could not go on the Minnesota; and this, though the receipts purported to be "memorandum of cargo on board steamship Minnesota." *Fowler v. Liverpool & Great Western S. S. Co.*, 87 N. Y. 190. In a Maryland case, in a suit against a railroad company to recover damages for delay in forwarding cattle intended for Monday's cattle-market, — it was held, that, in order to charge defendant with the consequences of the delay, it must be shown that defendant had knowledge, or from the circumstances of the case might reasonably have inferred, that the cattle were intended for that day's market. *Philadelphia, Wilmington, &c. R. R. Co. v. Lehman*, 56 Md. 209. In *McGraw v. Baltimore & Ohio R. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696, potatoes were delivered at the depot of a railroad company on the 13th of February, to be shipped on the 14th; there was a daily train between the place of shipment and the destination, the distance between which places was about 100 miles; the weather was mild, and continued so on the 14th; the potatoes did not reach their destination until the 16th, when they were so frozen as to be worthless, the weather on the 15th and 16th having become cold. It was held that the company was liable in damages. A railroad company is not relieved of liability to the penalty of \$25 per day under a statute for delay in shipment of goods beyond five days after receipt of the same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. The court held that five full running days are intended by the act, including Sunday whenever it intervenes; and that the company would not incur the penalty until the full expiration of the sixth day after the receipt of

the goods. *Keeter v. Wilmington & Weldon R. R. Co.*, 86 N. C. 346. Where, by a written contract between an express company and a railroad, the latter agreed to "receive, load and unload, deliver and way-bill" all freight sent by the former; and other railroads, forming a continuous line with the first, made similar agreements, each to be responsible for all loss or damage to the goods while in its possession; and the last road to deduct its charges and account to the preceding and so on to the first, — it was held that the different railroads did not become partners, and that each was liable only for its own negligence. *St. Louis Ins. Co. v. St. Louis, Vandalia, &c. R. R. Co.*, 104 U. S. 146. A shipping receipt in form "Received from . . . consigned to . . . for transportation to . . . This receipt can be exchanged for a through bill of lading," was held to render the defendant liable for the proper transportation of the goods even beyond the line of its own road, and until they were delivered to the consignee. *Myrick v. Michigan Central R. R. Co.*, 9 Biss. (U. S. C. C.) 44. In *Bills v. N. Y. Central R. R. Co.*, 11 N. Y. 5, in a suit to recover damages to plaintiff's cattle, delayed upon defendants' train by a flood which submerged the track, the court, upon a previous trial, held that, under the contract, defendants were not bound to unload the cattle when the train was stopped by the water; but that, upon reasonable request, their duty was to place the cars, if practicable, so as to enable plaintiff to unload his cattle, and that, for a failure to do so, they were liable. It appeared that plaintiff's agent made such a request; that the engine drawing the train was disabled, but that other engines might have been readily obtained; that defendants' conductor did not send for them. It was held that the question of negligence was properly for the jury; and that this was so, even if the jury might infer from the charge that it was negligence not to send forty-three miles for another engine. There was evidence tend-

¹ *Richards v. London, &c. Ry. Co.*, 7 C. B. 839.

as carriers is held to continue to the moment when their agents or servants deliver the goods, actually or constructively, to the consignee or his agent, or at the stipulated or authorized place of consignment,¹ or until delivery has been waived, or the goods have been tendered to and refused by the consignee.

SEC. 442. Care which must be used in the Delivery of the Goods.—The care which a carrier must take in delivering goods depends upon their nature, and the circumstances of each case. It is his duty to deliver, as well as to carry,² and the delivery must be made at the place directed by the consignor, if upon the carrier's route, and to a connecting carrier, if not upon the route of the carrier receiving the goods. In the case of railways and vessels, they are only bound to deliver at their wharves or warehouses; and after having given the consignee notice of the arrival of the goods, and a reasonable time in which to take them away, they cease to stand in the relation of carriers to, and are only liable as warehousemen for the goods.³ If the goods arrive upon Sunday or a legal holiday, the consignee is not bound to take them away upon that day, but is entitled to a reasonable time after;⁴ but if he begins to take them away *before* such day, but leaves the balance until *after*, the carrier is not liable for their destruction by fire except upon the ground of negligence.⁵

SEC. 443. When Carrier's Responsibility ceases, Question for Jury.—Whenever delivery has taken place, the responsibility of the car-

ing to show negligence on the part of defendants' servants in disabling the train, and it was held that the jury were properly instructed that if the train was disabled by such negligence, then their refusal to place the cars where plaintiff could unload was not to be excused by a want of motive power. Also that the plaintiff's damages could not be mitigated by speculating upon what might have happened had his request been granted, and the cattle unloaded. Before the train reached the water, those on board were warned. Plaintiff's agent then requested that the cars should be so placed that he could unload. His request was refused. It was held that defendants were not liable because of such refusal if their conductor had reason to believe that he could run through without serious detention.

¹ *Fowles v. Great Western Ry. Co.*, 7

Ex. 699; *Moffat v. Great Western Ry. Co.*, 15 L. T. N. s. 630.

² *Parker v. Flagg*, 26 Me. 181; *Schenk v. Phila. Steam Propeller Co.*, 60 Penn. St. 109; *Eagle v. White*, 6 Wheat. (Penn.) 505; *Erskine v. Thames*, 6 Miss. 371; *The Mary Washington*, 1 Abb. (U. S. C. C.) 1; *Lamb v. Camden, &c. R. R. Co.*, 2 Daly (N. Y. C. P.), 454; *Harris v. Rand*, 4 N. H. 259; *Ludwig v. Meyre*, 5 W. & S. (Penn.) 434.

³ *Alabama, &c. R. R. Co. v. Kidd*, 35 Ala. 209; *Sholes v. Ackerland*, 15 Ill. 474; *Gould v. Chapin*, 20 N. Y. 259; *Rowland v. Mills*, 2 Hilt. (N. Y. C. P.) 150; *Dean v. Vaccaro*, 2 Head (Tenn.), 288.

⁴ *Russell Mfg. Co. v. N. H. Steamboat Co.*, 50 N. Y. 121.

⁵ *Richardson v. Goddard*, 23 How. (U. S.) 23.

rier for the goods ceases; but he must deliver the goods as they were intended to be delivered. The address will be a sufficient guide as to the intention of the bailor,¹ and if the carrier delivers the parcel at a place to which it is not addressed, an action of trover lies against him.² But other circumstances must be considered before we can say definitely what will constitute a competent delivery, and in that way terminate the responsibility of the carrier. As might have been anticipated, this is, in many cases, a question rather for the jury than for the court.³

SEC. 444. *Delivery within Reasonable Time.*—Other duties with regard to delivery, however, devolve upon a carrier. The *place* is not only a matter of importance, but the *time* is an element of the contract. Goods are not delivered to a carrier that he may deliver them at his own pleasure, but that he may deliver them in such time as, looking at the length of his ordinary journey, the mode of the conveyance, and the circumstances of which the bailor might be cognizant before he intrusted his goods, shall be deemed reasonable.⁴ The question as to what will be considered a reasonable time is to be looked at in relation to all the circumstances of the case; the weather, the state of the roads, the season of the year, and other similar matters may be considered with a view to a satisfactory answer.⁵ Thus, where the defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time,—the obstruction having been caused solely by the negligence of another company, who had running-powers over their line,—the defendants were held not to be liable to the plaintiff for damage to his goods caused by the delay.⁶ While therefore, it is the carrier's duty to convey goods by means of the ordinary route, and without any unnecessary delay, both these duties may be obviated by the circumstances, and where either delay or deviation is necessary for the

¹ *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 676. See Add. on Con. 810.

² *Perkins v. Smith*, 1 Wils. 328; *Youl v. Harbottle*, Peake, N. P. C. 68; *Devereaux v. Barclay*, 2 B. & A. 702; *Stephens v. Elwall*, 4 M. & S. 259; and as distinguished from these, *Ross v. Johnson*, 5 Burr. 2825. See also *Bonney v. The Huntress*, 4 Hunt's Merch. Mag. 88; *The Ben Adams*, 2 Ben. (U. S. C. C.) 445; *Meyer v. Chicago, &c. R. R. Co.*, 24 Wis. 586.

³ See *Hedges v. Hudson River R. R. Co.*, 6 Robt. (N. Y.) 119.

⁴ *Hughes v. Great Western Ry. Co.*, 14 C. B. 637; *Raphael v. Pickford*, 5 M. & G. 558; *Davis v. Garrett*, 6 Bing. 725.

⁵ *Briddon v. Great Northern Ry. Co.*, 28 L. J. Exch. 51; *Broadwell v. Butler*, 6 McLean (U. S.), 296.

⁶ *Taylor v. Great Northern Ry. Co.*, 1 L. R. C. P. 385.

safety of the goods, it will be held to have been a part of the primary duty of the carrier.¹ It is the carrier's duty to deliver the goods to the consignee, upon his presenting himself in reasonable time and at a proper place to receive them. If the consignee does this, or until he has had an opportunity to do so, there seems to be no good ground for reducing the liability of the carrier to that of a warehouseman.² The rule may perhaps be better stated to be, that *the liability of a carrier as such, continues until the goods are ready to be delivered at their place of destination, and the consignee has had a reasonable opportunity, during the hours when such goods are usually delivered, in which to examine them so far as to judge of their outward appearance, and to remove them.*³ As to what constitutes a reasonable opportunity, it may be said that no reference is to be had to the peculiar circumstances of the consignee, but the question is whether he had an opportunity such as would give a person residing in the vicinity of the place of delivery and informed of the usual course of the business, and of the time when the goods are expected to arrive, suitable time *within the usual business hours* to take them away.⁴

In Massachusetts,⁵ however, it is held that the liability of the carrier, as such, ceases when the goods have reached their place of destination, and have been safely deposited upon the platform or in their

¹ Davis v. Garrett, 6 Bing. 725.

² Graves v. Hartford, &c. Steamboat Co., 38 Conn. 143; Gatcliffe v. Bourne, 4 Bing. 333.

³ Shenk v. Philadelphia Steam Propeller Co., 60 Penn. St. 109; The Mary Washington, 1 Abb. (U. S.) 1; Lamb v. Camden, &c. R. R. Co., 2 Daly (N. Y. C. P.), 454; Solomon v. Philadelphia Steamboat, &c. Co., 2 Daly (N. Y. C. P.), 104.

⁴ Moses v. Boston & Maine R. R. Co., 32 N. H. 523; Leavenworth, &c. R. R. Co. v. Maria, 16 Kan. 333; Blumenthal v. Brainard, 38 Vt. 402; Winslow v. Vt. &c. R. R. Co., 42 Vt. 700; Ouimit v. Henshaw, 35 Vt. 604; Porter v. R. R. Co., 20 Ill. 407; Alabama, &c. R. R. Co. v. Kidd, 35 Ala. 209; Chicago, &c. R. R. Co. v. Bensley, 69 Ill. 630; Wood v. Cracker, 18 Wis. 345; Lemke v. Chicago, &c. R. R. Co., 39 Wis. 449; Hirsch v. Quaker City, 2 Dis. (Ohio) 144; Morris, &c. R. R. Co. v. Ayres, 23 N. J. L. 393;

Maignan v. New Orleans, &c. R. R. Co., 24 La. An. 333. A common carrier has not performed his contract as carrier until he has delivered, or offered to deliver, the goods to the consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods, is a condition precedent to the right to warehouse them; and if a reasonable and diligent effort is not made, the carrier is liable for the consequences of the neglect. Zinn v. New Jersey Steamboat Co., 49 N. Y. 442; McAndrews v. Whellock, 52 N. Y. 40; Solomon v. Phila., &c. Steamboat Co., 2 Daly (N. Y. C. P.), 104.

⁵ Thomas v. Boston, &c. R. R. Co., 10 Met. (Mass.) 472; Norway Plains Co. v. Boston, &c. R. R. Co., 1 Gray (Mass.), 263; Stowe v. New York, &c. R. R. Co., 113 Mass. 521; Barron v. Eldredge, 100 Mass. 455.

warehouse, and that from that time, without notice to the consignee of their arrival, he is liable only as a warehouseman for their safe keeping; and this rule is adopted in North Carolina, Pennsylvania, Iowa, California, Indiana, Illinois, Alabama, and Georgia,¹ except that in the latter States the liability of the carrier is not changed to that of a warehouseman until the goods have been placed in the warehouse or other place of safe deposit. Where the consignee *knows* that the goods have arrived, and of their readiness for delivery, or is present when they arrived, the carrier is excused from giving notice; and if he neglects to take them away within a reasonable time, the carrier is absolved from liability therefor, as such.² If the carrier is ignorant of the whereabouts of the consignee, it is his duty to make due inquiry to ascertain it, and if, after due inquiry, he fails to ascertain the fact, he is excused from giving notice; and after a reasonable time for removal has elapsed, his liability as a carrier ceases, if he has stored the goods, and he is only liable as a warehouseman.³

Not only must delivery be made within a reasonable time, but also in a reasonable manner and at a proper place;⁴ and unless

¹ *Neal v. Wilmington, &c. R. R. Co.*, 8 Jones (N. C.), L. 482; *McCarty v. New York, &c. R. R. Co.*, 30 Penn. St. 247; *Mohr v. Chicago, &c. R. R. Co.*, 40 Iowa, 579; *Jackson v. Sacramento Valley R. R. Co.*, 23 Cal. 269; *Chicago, &c. R. R. Co. v. McCool*, 26 Ind. 140; *Chicago, &c. R. R. Co. v. Scott*, 42 Ill. 132; *Alabama, &c. R. R. Co. v. Kidd*, 35 Ala. 209; *Southwestern, &c. R. R. Co. v. Felder*, 46 Ga. 433.

² *Fenner v. Buffalo, &c. R. R. Co.*, 44 N. Y. 505; *Pelton v. Rensselaer, &c. R. R. Co.*, 54 N. Y. 214. In *Pinney v. First Division St. Paul, &c. R. R. Co.*, 19 Minn. 251, the rule was stated to be that, "if the consignee is present on the arrival of the goods, he must take them without unreasonable delay. But if he is not present, but lives at the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them." See also, adopting the same rule, *Buckley v. Great Western R. R. Co.*, 18 Mich. 121; *Culbreath v. Phila. &c. R. R. Co.*, 3 Houst. (Del.) 392; *Sprague v. N. Y. Central R. R. Co.*, 52 N. Y. 637. In *Mississippi*

it is held that where it is the custom of the company to give notice of the arrival of the freight, it is his duty to do so. *New Orleans, &c. R. R. Co. v. Tyson*, 46 Miss. 729.

³ *Pelton v. Rensselaer, &c. R. R. Co.*, *ante*.

⁴ *Goodwin v. Baltimore, &c. R. R. Co.*, 50 N. Y. 154. In this case, it was held that the duty of the carrier ceases by the landing of bulky articles upon a public wharf in the customary manner, with due notice to the consignee. If a carrier lands perishable articles upon a wharf upon an unsuitable day, without reasonable notice to the consignee, he is liable for the damages resulting. *McAndrews v. Whellock*, 52 N. Y. 40. See also, upon the general proposition in the text, *Rowland v. Miln*, 2 Hilt. (N. Y. C. P.) 150. The carrier is bound to provide a suitable place for delivery, and to provide suitable safeguards to prevent loss. *Sunderland v. Westcott*, 40 How. Pr. (N. Y.) 270; *Cleveland, &c. R. R. Co. v. Sargent*, 19 Ohio St. 433; *Propeller Mohawk*, 8 Wall. (U. S.) 153; *Hill v. Humphreys*, 5 W. & S. (Penn.) 123; *Haslam v. Adams Express Co.*, 6

these requisites are complied with, the responsibility of the carrier, as such, continues.

SEC. 445. **Misdelivery, Effect of.** — If goods are misdelivered by a carrier, it is treated as a conversion of the goods by him.¹ Thus, where a common carrier, where the circumstances are such as should put him upon inquiry, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order directed to the fictitious firm, he is liable to the consignor for their value.² In a case where the defendants received goods for transportation, accompanied by a manifest containing the instructions: "Order A. B., & Co., notify C.," and they delivered the same to C., without the order of A. and B. who were the plaintiffs, it was held that the defendants were liable for the loss incurred by the plaintiffs by such delivery. The defendants might perhaps decline to receive such shipments, but after they receive them they must obey the written directions of the consignor.³

If a custom as to the place and manner of delivery of goods to a certain person has been established, the carrier is justified in pursuing that method; but if he deviates therefrom, and, as a result, the goods are lost, he is liable therefor.⁴ But where a usage as to delivering goods to a particular person is relied on, it must appear that the usage is strictly observed; and if an order of the consignee is relied upon, delivery under the order can only be effectual, when made according to its terms.⁵ If the carrier, when bound to make a personal delivery, as in the case of an express company, tenders or offers to make delivery to the consignee at a proper time and place for delivery, and the consignee declines, for a cause which does not involve any fault on the carrier's part, to accept delivery, the carrier from that time stands only in the relation of a warehouseman.⁶

Bosw. (N. Y. Sup. Ct.) 235. But the consignee may, by accepting the goods at another and different place from that to which they are consigned, discharge the carrier from liability. *Jewell v. Grand Trunk R. R. Co.*, 55 N. H. 84; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215.

¹ *Claffin v. Boston, &c. R. R. Co.*, 7 Allen (Mass.), 341; *Viner v. N. Y. S. S. Co.*, 50 N. Y. 23.

² *Price v. Oswego, &c. R. R. Co.*, 50 N. Y. 213.

³ *Wright v. Northern Central R. R. Co.*, 8 Phil. (Penn.) 19; *Ela v. American M. U. Exp. Co.*, 29 Wis. 611.

⁴ *Southern Express Co. v. Everett*, 37 Ga. 688.

⁵ *Baldwin v. Am. Exp. Co.*, 23 Ill. 197; *Haslam v. Adams Exp. Co.*, 6 Bos. (N. Y.) 235.

⁶ *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 97.

SEC. 446. **Delivery to right person.** — The duty of the carrier is imperative to deliver to the right person, and no amount of care will excuse him for delivering to the wrong person;¹ neither fraud, imposition, nor mistake will excuse him from liability if he delivers to the wrong person.² If he does not know the consignee, he should require proof of his identity, which he may do when his requirements in that respect are not unreasonable, and whether they are or not is for the jury.³ In some of the States it is held that where goods are delivered to an impostor who has ordered them in a fictitious name, the company not having required identification, it is liable to the consignors therefor.⁴ Thus, in the Vermont case cited *supra*, in an action brought against a railroad company for the non-delivery of goods, it appeared that the goods were ordered from the plaintiffs by C., writing under the false name of R., and intending to swindle the plaintiffs. The plaintiffs addressed the goods to R., and forwarded them by defend-

¹ *Sanquer v. London, &c. Ry. Co.*, 16 C. B. 163; *McKean v. McIver*, L. R. 6 Exchq. 36; *Heugh v. London, &c. Ry. Co.*, L. R. 5 Exchq. 51; *Cork Distilleries Co. v. Gt. Southern, &c. Ry. Co.*, 5 Ir. Rep. C. L. 177; *Meyer v. Chicago, &c. R. R. Co.*, 24 Wis. 566; *Winslow v. Vt. &c. R. R. Co.*, 42 Vt. 700; *Stephenson v. Hart*, 4 Bing. 476; *Am. Exp. Co. v. Stack*, 29 Ind. 27; *Youl v. Harbottle*, Peake, 68; *Brown v. Hodgson*, 4 Taunt. 189.

² *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34. If the goods are delivered upon a forged order, the carrier is liable as for a conversion. *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Duff v. Budd*, 3 B. & B. 177; *Powell v. Myers*, 26 Wend. (N. Y.) 290; *Guillaume v. Packet Co.*, 42 N. Y. 212; *Devereaux v. Barclay*, 2 B. & Ald. 702. See also *Southern Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Stephenson v. Hart*, 4 Bing. 476; *Chapman v. New Orleans, &c. R. R. Co.*, 21 La. An. 224; *Ten Eyck v. Harris*, 47 Ill. 288; *McKean v. McIver*, L. R. 6 Exch. 36; *Meyer v. Chicago, &c. R. R. Co.*, 24 Wis. 566; 1 Am. Rep. 207; *Jones v. Earl*, 37 Cal. 630; *The Ben Adams*, 2 Ben. (U. S. C. C.) 445; *Jeffersonville R. R. Co. v. White*, 6 Bush (Ky.), 251; *Dunlap v. Hunting*, 2 Den. (N. Y.) 643; *Carroll v.*

Mix, 57 Barb. (N. Y.) 215; *Roberts v. Riley*, 15 La. An. 103; *Burrell v. North*, 2 C. & K. 680; *Bradley v. Waterhouse*, 3 C. & P. 318; *Packard v. Getman*, 4 Wend. (N. Y.) 615; *Michigan Central R. R. Co. v. Day*, 20 Ill. 375; *Ball v. Liney*, 48 N. Y. 6; *Wilson v. Vermont Central R. R. Co.*, 42 Vt. 200; 1 Am. Rep. 365; *American Merchants' Express Co. v. Milk*, 73 Ill. 224; *Dufour v. Murphy*, 37 Miss. 577; *Willard v. Bridge*, 41 Barb. (N. Y.) 361; *Dudley v. Hawley*, 40 Barb. (N. Y.) 397; *Dean v. Vaccaro*, 2 Head (Tenn.), 485; *Guillaume v. Hamburgh Co.*, 42 Vt. 212; *Hempstead v. New York Central R. R. Co.*, 28 Barb. (N. Y.) 485; *Rogers v. Weir*, 34 N. Y. 463; *Ostrander v. Brown*, 15 Johns. (N. Y.) 40; *Tuttle v. Gladding*, 2 E. D. S. (N. Y. C. P.) 157.

³ *Watt v. Porter*, 2 Mas. (U. S.) 77; *Sargent v. Gile*, 8 N. H. 325; *Leighton v. Shapley*, 8 N. H. 359; *Dent v. Chiles*, 5 S. & P. (Ala.) 383; *Duff v. Budd*, *ante*; *Am. Exp. Co. v. Fletcher*, 25 Ind. 492; *So. Exp. Co. v. Van Meter*, 17 Fla. 783; 35 Am. Rep. 107; *Am. Exp. Co. v. Stack*, 29 Ind. 27. The fact that the goods are delivered on a forged order is no defence. *Gosling v. Higgins*, 1 Camp. 451; *Lubbock v. Inglis*, 1 Stark. 104.

⁴ *Winslow v. Vt. &c. R. R. Co.*, 42 Vt. 700.

ants' road. C. awaited their arrival, and claimed them under the name of R., which name he assumed for the purpose of getting them; and the defendants delivered them without requiring identification, or taking any other precaution to make sure that the person receiving them was R. It was held that they were liable for a misdelivery. They were chargeable with negligence. They should have required the claimant to identify himself as R., and on his failure to do so, should have held the goods for the consignors. The fact that the plaintiffs had been led by fraud to address the goods in a fictitious name did not operate to mislead the company, nor was the error in the name any reason why they should have delivered the goods without inquiry as to the identity of the person claiming them with the one named in the address. "What," say the court, "should be the effect upon the measure of the defendants' responsibility, of the plaintiff's error in directing the goods to a fictitious address? This might be an important question if the error had misled the defendants, and occasioned them to deliver the goods to the wrong party after they had used that care and precaution which would be reasonable in such matters. But this error in the direction could not excuse the defendants from the exercise of at least ordinary care in the delivery of the property. They did not exercise such care. They were guilty of actual negligence. They delivered the goods to an employé of a truckman upon his mere statement that Roberts sent for them; any other man in Boston could have obtained them just as easily. The swindler, Collins, was not known as Roberts, and if he had been required to identify himself as Roberts, might never have attempted it; and if he had, it would have been likely to have led to the detection of the fraud." Where the goods are actually delivered to the person who ordered them, the carrier is not excused if the goods were shipped in a fictitious name, and the person to whom they were delivered was not known by that name, and no reasonable inquiries were instituted by the carrier to ascertain the identity of the consignee as the person to whom they were addressed. The reason for this rule is that the carrier must use reasonable diligence in delivering the goods to the party to whom they are addressed, and if they are professedly addressed in a fictitious name, this circumstance of itself puts the carrier upon inquiry, and calls for the exercise by him of increased vigilance in ascertaining whether a person known by a different name is in fact entitled to them; because as stated in

the Vermont case before referred to, such inquiry and vigilance would be calculated to discover the fraud, if any; and if in fact there was no fraud, the parties cannot complain of any delay or inconvenience which their own acts have occasioned.¹ Not only is the carrier bound to deliver the goods to the consignee or owner, but he is also bound to deliver them *at the place* to which they are shipped; and if upon the faith of a forged order, he delivers them to a person other than the owner, *at another place, although to a person of the same name*, he is liable for the goods.²

The liability of the carrier as to delivery depends upon the question whether or not, in making the delivery to the wrong person, he acted with a proper degree of care and prudence in ascertaining the right of the person to whom the delivery was made, to have the goods, or was in that respect guilty of negligence; and there is a class of cases in England, and in some of the States of this country, where a rule apparently contrary to that adopted in the cases already cited is held.³ In some cases where the goods are sent to a person addressed in a fictitious name, and they are delivered to a person known to the carrier, who represents himself as the agent of such person, it is held that, inasmuch as they are delivered to the person for whom they were intended, the carrier is not liable.⁴ If the goods are ordered in a fictitious name, with an intent to defraud, and are directed to be sent to the address given at a certain street and number, and the goods are so sent, and the carrier takes such steps as he is required to take to deliver them there,

¹ Price v. Oswego & Syracuse R. R. Co., 50 N. Y. 213.

² Houston, &c. R. R. Co. v. Adams, 49 Tex. 748; 30 Am. Rep. 116.

³ In Western Union Telegraph Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1, an impostor at Cincinnati sent a despatch to Joseph Meyer, the plaintiff, at Selma, Alabama, in the name of Max Reis, requesting the plaintiff to send him a telegraphic money-order for forty dollars, immediately. The plaintiff received the despatch, and, supposing it to be from his nephew of that name, who was then on his way from New York to Selma, paid the money to the defendants, and received from them a receipt as follows: "Received from Joseph Meyer forty dollars to be paid to Max Reis at Cincinnati, Ohio." On the same day the defendant handed over

the money to the person who sent the despatch to the plaintiff, who was not known to the company's agent, or identified as a person whose name was Max Reis, and who, in fact, was an impostor, and not the plaintiff's nephew. The plaintiff had judgment in the court below, but upon appeal the judgment was set aside upon the ground that, as there were no suspicious circumstances to put the company upon further inquiry as to the identity of the impostor, the company could not be charged with negligence in that respect, and therefore were not liable for the money. But *contra*, see Elwood v. Western Union Tel. Co., 45 N. Y. 549; Norwalk Bank v. Adams Exp. Co., 4 Blatchf. (U. S. C. C.) 455.

⁴ Dunbar v. Boston & Providence R. R. Co., 110 Mass. 26.

he cannot be held chargeable as for a misdelivery, although there is no such person or firm doing business at that place.¹ But if the carrier delivers at the place indicated, or does what is equivalent to a delivery, he does all that he is bound to do. *He obeys the sender's orders, and is guilty of no wrong. To make him liable, there must be some fault.* It is a question of fact whether there has been any such negligence as makes him liable for the conversion of the goods; and where he has carried out the directions of the sender, the mere fact that he has delivered them to some person to whom the sender did not intend delivery to be made is not sufficient to support the allegation that he has converted them.²

It is important, in the decision of questions of this character, to ascertain whether, at the time of the alleged misdelivery, the defendant occupied the relation of carrier, or only that of a warehouseman to the goods; because, as is said in some of the cases, the carrier, as such, is under the same obligation or duty to *deliver* the goods safely that he is to carry them.³ It delivers property at its peril, and must take care that it is delivered to the right party; for if the delivery is to the wrong person, either by an innocent mistake or through the fraud of third persons, as upon a forged order, it will be responsible, and the wrongful delivery will be treated as a conversion.⁴ But if it holds the goods only as a warehouseman, the authorities are all agreed that it is only responsible where it fails to act with ordinary care and prudence in reference to the keeping or delivery of the goods.⁵ When this condition exists, the consignor, in order to charge the carrier with liability for the loss of the goods, must show that he has acted negligently in respect to the matter producing the loss; or perhaps it should be said that the carrier may show, to protect himself from liability, that his relation to the goods as carrier had ceased, and that the loss ensued without his fault or negligence.⁶ Whether a carrier who is bound to make a personal delivery has made reasonable inquiry to find the consignee, so that his liability as a carrier has ceased, depends upon the circumstances of each case; and in deter-

¹ McKean v. McIver, L. R. 6 Exch. 36.

⁵ Witbeck v. Holland, 45 N. Y. 13.

² Hough v. London, &c. Ry. Co., L. R. 5 Exch. 50.

⁶ Neal v. R. R. Co., 8 Jones (N. C.),

³ Winslow v. Vt., &c. R. R. Co., 42 Vt. 700.

L. 482; Fenner v. R. R. Co., *ante*; Fisk v. Newton, 1 Den. (N.Y.) 45; Weed v. Barney, *ante*; Kremer v. Southern Exp. Co., 6 Coldw. (Tenn.) 356; Hudson v. Baxendale, 2 H. & N. 575.

⁴ McEntee v. N. J. Steamboat Co., 45 N. Y. 34.

mining this question it is competent to show whether or not the consignee was well known at the place to which the goods were consigned.¹

SEC. 447. **What constitutes a delivery.**—The company cannot claim that it has delivered the goods simply because the consignee is present to see them unloaded, or even assists in unloading them. It is bound to deliver them at a safe and convenient place, and there can be no determination of its liability as a carrier until it has done so. Thus, in an English case,² the consignee's servants were present, and assisted the company's servants in unloading some cattle consigned to the plaintiff. The cattle were unloaded at a siding where only one truck could be unloaded at a time. There was no yard to receive the cattle, and those which came out of the first truck had to stand in the station-yard while the others were being unloaded. While this was being done, some of them strayed upon the track and were killed by a passing engine; and it was held that there was no delivery of the cattle, because they had not been delivered in a safe and convenient place. If, however, cattle are taken out of the cars, and either the consignee or his servant is present to take possession of them, and they place them in a yard, although upon the company's premises, the liability of the company is at an end, and if they are afterwards injured without the fault of the defendant, the loss falls upon the consignee.³ If the consignee refuses to accept the goods,⁴ the company becomes a mere involuntary bailee thereof, and should retain them for a reasonable time. It seems that upon such refusal the company has no right to return the goods at once to the consignor.⁵ They should retain the goods if they have conveniences for so doing, and await advice from the consignor.

SEC. 448. **Delivery must be made within reasonable time.**—When goods are received for carriage without any special contract as to the time of delivery, they must be delivered within a reasonable time.⁶ This common-law obligation may, however, be superseded by a special contract to deliver within a certain time, and

¹ *Witbeck v. Holland*, 45 N. Y. 13.

⁵ *Cranch v. Great Western Ry. Co.*, 3

² *Rooth v. North-Eastern Ry. Co.*, L. R.

H. & N. 183.

2 Exchq. 173.

⁶ *Raphael v. Pickford*, 5 M. & G. 558;

³ *Shepherd v. Bristol, &c. Ry. Co.*, L. R.

Donahoe v. London, &c. Ry. Co., 15

3 Exchq. 189.

W. R. 792.

⁴ *Heugh v. London, &c. Ry. Co.*, L. R.

5 Exchq. 51.

when such a contract is entered into, nothing will excuse the company's failure therefrom.¹ So, too, the company may by special contract supersede its common-law liability to deliver within a reasonable time,—as, where it provides that it shall not be held responsible for delivery within “any certain or definite time.”² The question as to what is a reasonable time depends upon the circumstances of each case, and is for the jury.³ As to what is the usual time for transit and delivery the courts will take judicial notice; but while the ordinary time for delivery is *prima facie*, it is not necessarily, equivalent to a reasonable time.⁴ Delay occasioned by the act of God,—as, by a freshet sweeping away a portion of its track,⁵ or a snow-storm which blocks up the road and renders a passage over it impossible, without extraordinary efforts and expense, will excuse delay.⁶ So, too, if a railway company is well equipped for its ordinary business, it cannot be held responsible for a delay occasioned by an extraordinary influx of business which it had no reason to anticipate, and for which it has had no opportunity to prepare.⁷ If the goods, in accordance with a general usage, or the directions of either the consignor or consignee, are retained in the company's warehouse, it ceases to be liable as a carrier therefor;⁸ and the same is true where goods are received to await future orders.⁹ It is not treated as a gratuitous bailee because it has the right to charge for storage after the lapse of a reasonable time, and until the lapse of such time the compensation for carriage is treated as including the expense of storage.¹⁰ A warehouseman is not an insurer of goods in his custody, but is only liable for negligence in respect to their custody. He is only bound to use such care as a reasonably prudent man would use in respect to the goods in question.¹¹ Consequently, if the goods are destroyed by an acci-

¹ *Donahoe v. London, &c. Ry. Co., ante*; *Pickford v. Grand Junction Ry. Co.*, 12 M. & W. 766.

² *Hughes v. Great Western Ry. Co.*, 14 C. B. 637.

³ *Wren v. London, &c. Ry. Co.*, 1 L. T. N. S. 5; *Hales v. London, &c. Ry. Co.*, 4 B. & S. 66.

⁴ *Great Northern Ry. Co. v. Taylor*, L. R. 1 C. P. 385.

⁵ *Lipford v. Charlotte R. R. Co.*, 7 Rich. (S. C.) 409.

⁶ *Great Northern Ry. Co. v. Taylor, ante*.

⁷ *Wallace v. Great Southern, &c. Ry. Co.*, 17 W. R. 464; *Angell on Carriers*, 252.

⁸ *Garside v. Trent Nav. Co.*, 4 T. R. 581; *In re Webb*, 8 Taunt. 448.

⁹ *Cairns v. Robins*, 8 M. & W. 258; *Chapman v. Great Western Ry. Co.*, 28 W. R. 566.

¹⁰ *White v. Humphrey*, 11 Q. B. 43; *Cairns v. Robins, ante*.

¹¹ *Searle v. Laverick*, L. R. 9 Q. B. 122; *Harris v. Great Western Ry. Co.*, 45 L. J. Q. B. 189; *Giblin v. McMellin*, L. R. 2 P. C. 317.

dental fire,¹ or are injured or destroyed by rats,² or stolen,³ or are injured or destroyed by any casualty without his fault, he cannot be held responsible therefor.⁴ But according to the case last cited, the burden is upon him to show that he was not at fault.

SEC. 449. *Evidence of non-delivery.* — It is sufficient, in an action against a carrier for non-delivery, to show that the goods never reached the consignee;⁵ and whether the circumstances amount to a delivery in a given case is wholly a question for the jury.⁶ In case of a partial delivery, evidence that the weight or amount of goods delivered to the consignee is less than the weight or amount delivered to the carrier is *prima facie* sufficient to charge the latter for the deficiency, or to compel him to show that it did not arise from his negligence.⁷ So proof that goods were in a proper condition when delivered to the carrier, but were damaged when delivered by the latter to the consignee, is sufficient to charge the carrier with the damage.⁸ But the company may rebut the presumption arising from such proof by showing that the loss arose from some one of the excepted perils, or that they are exempted from liability, under the terms of the contract.

It is sufficient to show that the effect of an act of Nature could not have been prevented by any amount of foresight, pains, and care *reasonably* to be required of the carrier.⁹ But the carrier is bound as against all perils to do his utmost to protect the goods from loss or damage; and if an uncommon or unexpected danger arises, he must use efforts proportioned to the emergency to ward it off.¹⁰ If he fails to do so, he remains liable although the so-called act of God may have been the immediate cause of the mischief. If the immediate cause is the act of man although not amounting to negligence, it will not be an excuse for injury to goods, notwithstanding the elementary forces of Nature may have contributed to the misfortune.¹¹

SEC. 450. *Loss by Fire.* — Unless arising from lightning, a company would be liable for damage caused by fire, although the fire

¹ *Garside v. Trent Nav. Co., ante.*

² *Caillif v. Danvers, Peake, 114.*

³ *Finucane v. Small, 1 Esp. 315.*

⁴ *Mackenzie v. Cox, 9 C. & P. 632.*

⁵ *Griffiths v. Lee, 1 C. & P. 110; Gil-*

bart v. Dale, 5 Ad. & EL. 547; Evans v.

Bristol, &c. Ry. Co., 10 W. R. 359.

⁶ *Quiggin v. Dunn, 1 M. & W. 174.*

⁷ *Hawkes v. Smith, C. & M. 72.*

⁸ *Higginbotham v. Great Northern Ry. Co., 10 W. R. 358.*

⁹ *Nugent v. Smith, L. R. 1 C. P. D.*

423.

¹⁰ *Leck v. Maestaer, 1 Camp. 138.*

¹¹ *Oakley v. Portsmouth, &c. Packet Co., 11 Exchq. 618.*

did not arise on their own premises, and although they may have used all possible means to prevent its spreading to their premises.¹

SEC. 451. **Misconduct of a third Person.** — If the loss is occasioned by the misconduct of a third person, and not through any fault or neglect on the part of the company, the latter are responsible to the owner, as they have a remedy over against the offending party.² But if the misconduct of the third person is caused by the orders of the owner of the goods, the company will not, of course, be responsible.³

The rule as to exemption from liability from the inherent nature of the thing carried has thus been stated and illustrated: A horse slips or falls, or kicks or plunges, or in some way hurts itself. If it does so from no cause other than its own inherent propensities, its "proper vice," — that is to say, from fright or temper, or struggling to keep its legs, — the company are not liable. But if it so hurts itself from any act of negligence of the company, or from any misfortune happening to the train, though not through any negligence of the company, — as for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, — then the company as insurers would be liable. If perishable articles are injured through their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them or by an extraordinary shock or shaking, whether through negligence or not, the company are liable.⁴

The company are not liable for injury or loss caused by the negligence of the owner or his servant, — as, where a man is sent in charge of cattle, and they are killed by reason of his negligence.⁵ If by the course of dealing the owner of the goods supplies the means of delivery, and these means fail without the fault of the carrier, the latter is exonerated, — as, where a pipe of wine was broken in delivery by the giving way of a skid supplied by the owner.⁶ Ordinarily, a company would not be liable for leakage of casks, if the leakage arises from an inherent defect in the cask, or from the manner in which the bung-hole was stopped;⁷ but if during the journey the

¹ *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent, &c. Nav. Co.*, 5 T. R. 389.

² *Trent Nav. Co. v. Ward*, 3 Esp. 130.

³ *Butterworth v. Brownlow*, 34 L. J. C. P. 267.

⁴ *Kendall v. London, &c. Ry. Co.*, L. R. 7 Ex. 373; *Nugent v. Smith*, *ante*.

⁵ *Rooth v. North-Eastern Ry. Co.*, L. R. 2 Ex. 173.

⁶ *Nurrell v. Larkin*, 1 L. J. C. P. 2.

⁷ *Hudson v. Baxendale*, 6 W. R. 83.

cask is perceived to be leaking, and the company's servants take no steps to prevent the leakage, the company would be liable.¹

If goods are improperly packed, and the company receives them only on the express condition that they are not to be responsible for improper packing, they will not be liable for an injury the goods may suffer through not being properly packed.² And apart from any such condition, if the packing or securing is that usually adopted for goods of a like nature, and the company is led by the consignor to suppose that it is sufficient in the particular case, they will not be liable if it proves insufficient, and injury or loss thereby results.³ But inasmuch as a company may refuse to receive improperly packed goods, or receive them only subject to conditions qualifying their liability, if they receive them without such qualification, and the defect is visible, they become liable if the goods are damaged, although partly through the packing, and the defective packing only goes in reduction of damages.⁴ Carrying in a manifestly unsafe condition is carrying without due care. And where a dog was delivered to a carrier, fastened only by a string, which was not sufficient to secure it, he was held liable for its loss because he had the means of seeing that the dog was not sufficiently secured.⁵

SEC. 452. Fraud by the Customer.—A company will not be liable for loss caused by the fraud of the customer; as where he does anything to disguise the nature of the goods,⁶ or to lull the vigilance of the company by treating a valuable parcel as of no or only ordinary value,⁷ so as to prevent it from taking any particular care of it, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means the customer has adopted⁸ for the holding out by the consignor as an ordinary risk what is in reality an extraordinary risk, and thus inducing the company to accept it as an ordinary risk, is a legal fraud.⁹

If the consignor has induced the company's agents to depart from their usual course of dealing, and to receive goods on terms and under

¹ *Beck v. Evans*, 16 East, 244; *Cox v. London, &c. Ry. Co.*, 3 F. & F. 77.

² *Barbour v. South-Eastern Ry. Co.*, 34 L. T. N. s. 67.

³ *Richardson v. North-Eastern Ry. Co.*, L. R. 7 C. P. 74.

⁴ *Higginbotham v. Great Northern Ry. Co.*, 10 W. R. 358.

⁵ *Stuart v. Crawley*, 2 Stark. 323; *Richardson v. North-Eastern Ry. Co.*, *ante*.

⁶ *Walker v. Jackson*, 10 M. & W. 16.

⁷ *Sleat v. Fagg*, 5 B. & Ald. 342.

⁸ *Bradley v. Waterhouse*, M. & M.

154.

⁹ *Batson v. Donovan*, 4 B. & Ald. 37.

circumstances different from those under which the consignor knew they were authorized to receive them, the company will not be liable.¹ Where a company claim to be exempt from liability by reason of their special contract with the consignor or owner, it must be shown that the contract is in writing, and just and reasonable in its terms, and that the loss or injury is within the terms of the exemption. A contract with a company is to be construed most strongly against the company, as the maker of it.²

The construction of the contract is a matter of law, and belongs to the court alone, which must look at all the surrounding circumstances and the course of dealing between the parties, and then see what is the meaning of the terms employed, when used in reference to those surrounding circumstances and the course of dealing.³ The special circumstances, if any, are to be ascertained as facts by the jury.⁴ A special contract will not be construed to exempt the company from even the excepted perils *when the negligence of the company contributed to the loss by such excepted perils*. Thus, a condition relieving against injury in the delivery of cattle occasioned by the restiveness of the animals, was held no defence where, although the injury was caused by the restiveness of the animals, the company had not used reasonable precaution to guard against the consequences of such restiveness.⁵ So, if the injury arose from the defects of the station.⁶ And a stipulation that the company shall not be liable for leakage or breakage will not relieve them from such damage or loss caused by their own neglect.⁷

A contract relating to one matter will not be construed to relieve the company from loss from an entirely distinct matter. Thus, a contract to carry at "owner's risk," means that whatever happens on the journey is to be at the owner's risk, and does not relieve the company from liability under their implied independent contract to carry and deliver within a reasonable time.⁸ Where by their contract the company are to be liable only for negligence, the *onus* of

¹ *Slim v. Great Northern Ry. Co.*, 23 L. J. C. P. 166; *Belfast, &c. Ry. Co. v. Keys*, 9 H. L. C. 556; *Edwards v. Sherratt*, 1 East, 604; *Harris v. Great Western Ry. Co.*, 45 L. J. Q. B. 737.

² *Mitchell v. Lancashire & Yorkshire Ry. Co.*, L. R. 10 Q. B. 256.

³ *Lewis v. Great Western Ry. Co.*, L. R. 3 Q. B. D. 45; *Peck v. North Staffordshire Ry. Co.*, 10 H. L. C. 478.

⁴ *Neilson v. Harford*, 8 M. & W. 823; *Lewis v. Great Western Ry. Co.*, *ante*.

⁵ *Gill v. Manchester, &c. Ry. Co.*, L. R. 8 Q. B. 186.

⁶ *Booth v. North-Eastern Ry. Co.*, L. R. 2 Ex. 173.

⁷ *Phillips v. Clark*, 2 C. B. N. s. 156.

⁸ *Robinson v. Great Western Ry. Co.*, 35 L. J. C. P. 127; *D'Aro v. London, &c. Ry. Co.*, L. R. 9 C. P. 325.

proving negligence lies on the plaintiff.¹ So if the company contracts that it will not be liable "except upon proof that the loss, damage, or delay arose from the wilful misconduct of the company's servants," it is necessary to give affirmative evidence of such misconduct; it cannot be inferred.² It would be wilful misconduct if the goods were put in a car not proper for the conveyance of the goods,³ or if it is brought to the notice of the company's servant that he is doing or omitting to do something which may seriously endanger the goods, and he persists in doing that which he has been warned not to do. So, where the company's servants intentionally deliver to the wrong person,⁴ But improper packing, where it was not shown that the packers knew they were packing them in a manner likely to damage the goods, but they simply did not take the trouble to inform themselves whether or not damage would result from the packing;⁵ negligence in allowing cattle to stray on the line after they were unloaded;⁶ loading goods on a car too high to pass under the bridges of another railway company, by reason of which the car was delayed while repairs were being made to enable it so to pass;⁷ and placing horse-rakes on a truck shorter than themselves, it not being proved that this was in itself the cause of injury,⁸—have been held not to amount to "wilful misconduct."⁹

SEC. 453. Who may sue for Loss or Injury.—In the absence of an express contract, it is presumed that the carrier is employed by the person at whose risk the goods are carried; that is, the person whose goods they are, and who would suffer if they were lost.¹⁰ If there has been a valid sale of the goods by the consignor to the consignee, the former acts merely as the agent of the latter in delivering them to the carrier, and they are from that time at the risk of the consignee; and if lost or injured, the latter is the proper person to sue the carrier therefor,¹¹ even though the freight was prepaid by the

¹ *Harris v. Midland Ry. Co.*, 25 W. R. 63.

² *Lewis v. Great Western Ry. Co.*, L. R. 3 Q. B. D. 45; *Great Western Ry. Co. v. Glenister*, 22 W. R. 72; *Webb v. Great Western Ry. Co.*, 26 W. R. 111; *Haynes v. Great Western Ry. Co.*, 41 L. T. N. S. 436.

³ *Lewis v. Great Western Ry. Co.*, *ante*.

⁴ *Hoare v. Great Western Ry. Co.*, 25 W. R. 631.

⁵ *Lewis v. Great Western Ry. Co.*, *ante*.

⁶ *Great Western Ry. Co. v. Glenister*, *ante*.

⁷ *Webb v. Great Western Ry. Co.*, *ante*.

⁸ *Haynes v. Great Western Ry. Co.*, *ante*.

⁹ *Redman on Railway Carriers*, pp. 123–130.

¹⁰ *Dacey on Parties to Actions*, 87; *Mobile, &c. R.R. Co. v. Williams*, 54 Ala. 168.

¹¹ *Dawes v. Peek*, 8 T. R. 330; *Cork Distilling Co. v. Great Southern, &c. Ry. Co.*, 7 H. L. 269; *Penn. Co. v. Holderman*, 1 Am. & Eng. R. R. Cas. (Ind.) 285.

consignor.¹ If, however, the property in the goods has not passed from the consignor, as, if they are sent subject to approval, the consignor must sue;² or if the sale is not binding on the consignee by reason of non-compliance with the statute of frauds.³ Where goods are misdelivered, the consignor is the proper person to sue, unless the property in the goods has passed to the consignee;⁴ and the same is also the rule when the consignee cannot be found, or where the goods have been sent upon a fraudulent order.⁵ If the consignor has contracted with the consignee to deliver the goods to him at the termination of the transit, the consignor only can sue; but if he has merely contracted to deliver them on board the cars, the property in the goods vests in the consignee when the goods are delivered to the carrier, and he alone can sue for their loss, or for an injury thereto.⁶

If the separate property of two persons has been shipped in the same package, in case of loss it has been held that they may join in an action therefor.⁷ A special property in goods has been held sufficient to uphold an action. Thus, it has been held that a laundress may sue a carrier for the loss of linen returned by her through a carrier, the ground being that she is liable to the owner for the loss, and is therefore damaged to the extent of the value of the linen.⁸ If the goods were carried under a special contract between the company and one of the parties, the party to the contract should sue.⁹

SEC. 454. Damages recoverable. — If goods are lost, their market value at the place to which they are consigned is the measure of recovery,¹⁰ — at the time when they ought to have reached their destination,¹¹ — less the amount of freight, unless it has been paid in advance. If the goods have no market value at the place of delivery, then the cost of the goods, and the expense of transit, or in other words the actual value of the goods is the measure of recovery.¹² If the value of the goods was stated by the consignor to the

¹ *King v. Meredith*, 2 Camp. 639.

² *Swain v. Shepherd*, 1 M. & R. 223;
Finn v. Western R. R. Co., 112 Mass. 524.

³ *Coates v. Chaplin*, 3 Q. B. 483;
Coombs v. Bristol, &c. Ry. Co., 3 H. & N. 510.

⁴ *Hoare v. Great Western Ry. Co.*, 25 W. R. 631.

⁵ *Heugh v. London, &c. Ry. Co.*, L. R. 5 Exchq. 51.

⁶ *Dunlop v. Lambert*, 6 Cl. & F. 600;

Davis v. James, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659.

⁷ *Metcalf v. London, &c. Ry. Co.*, 4 C. B. n. s. 317.

⁸ *Freeman v. Birch*, 3 Q. B. 492, n.

⁹ *Redman on Railway Carriers*, 147.

¹⁰ *Rice v. Baxendale*, 7 H. & N. 96.

¹¹ *Brandt v. Bawlyby*, 2 B. & Ad. 932.

¹² *British Columbia Saw Mill v. Nettle-ship*, L. R. 3 C. P. 499; *O'Hanlan v. Great Western Ry. Co.*, 6 B. & S. 484.

carrier to be a certain sum, no greater sum can be recovered.¹ The company is only liable for the reasonable consequences of the breach of its contract. Thus, where a plan and model were sent to a certain place to compete for a prize, the proper measure of recovery was held to be the value of the labor and materials expended in making the article; and damages for the loss of the opportunity to compete for the prize were held too remote for consideration.² If the goods are only partially destroyed, or are injured, the difference between their value at the place of delivery at the time and in the condition in which they ought to have arrived, and their value at the time and in the condition in which they did arrive, is the measure of recovery.³

The most vexatious questions relating to damages are those which arise in actions for delay in delivering the goods, and the action is for the loss of a market or of profits in consequence of delay. If there has been a delay in delivering which amounts to a breach of contract, it seems that nominal damages are recoverable, although no special damages are proved.⁴ But if the plaintiff has sustained actual damage, he is not always entitled to recover the full amount. Thus, where there has been an unreasonable delay in the delivery of goods, the damages *prima facie* would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered, and their value at the time when they are delivered in fact.⁵ Any loss above this difference sustained by the plaintiff, not from the delay alone, but out of his own special arrangements or circumstances, cannot be recovered in the absence of a special contract, express or implied. But if the intended use and application of the goods to be carried was expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of both parties to the contract, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract.⁶ It is clear the company

¹ *McCanee v. London, &c. Ry. Co.*, 3 H. & C. 543.

² *Lythgoe v. East Anglia Ry. Co.*, 15 Jurist, 400.

³ *Collard v. South-Eastern Ry. Co.*, 7 H. & N. 79.

⁴ *Robinson v. Great Western Ry. Co.*, 35 L. J. C. P. 123; *Roberts v. Midland Ry. Co.*, 25 W. R. 323.

⁵ *Horn v. Midland Ry. Co.*, L. R. 8 C. P. 131.

⁶ *Simpson v. London, &c. Ry. Co.*, L. R. 1 Q. B. 274.

may refuse to accept the goods on the basis of such a special liability, but if they accept without objection they acquiesce in the liability. But merely labelling goods as "travellers' goods" was held not to affect a company with notice, so as to make them liable for special damages for delay in the delivery.¹

In many cases of claim for loss of market, the company have constructive notice from the apparent nature of the goods, their destination, or from previous dealings, that they are being sent to a particular market, and therefore they are clearly bound to recompense the owner the reasonable loss flowing from his being disappointed of the market; and where the customer stipulates that the goods shall be sent the same evening a special contract is created, and the company may be sued for the breach of it.²

Where the plaintiff was a dealer in cattle-spice, and was in the habit of going about to agricultural shows exhibiting samples, and having exhibited them at a show at B., was desirous of exhibiting them at another show at N., the defendant railway company had a special office in the show-ground at B. for the purpose of receiving and forwarding exhibited goods, and the plaintiff's agent delivered his wares to the defendant's clerk, who supplied a blank consignment-note, which was filled up by the plaintiff's agent, describing the goods as "sundries," addressed to the N. show-ground and indorsed "must be delivered on Monday certain." The goods not having been delivered on Monday, nor in time for the show, it was held that the plaintiff was entitled to recover the damages resulting from the defendant's failure to deliver in time,—namely, his expenses and loss of profits.³ But the company must have actual or constructive notice of the extraordinary damages likely to result from delay in transit, or they will not be liable for such damages.⁴

Where the delivery of a shaft was delayed an unreasonable time, by which a mill was stopped, it was held that inasmuch as the

¹ *Candy v. Midland Ry. Co.*, 38 L. T. N. S. 226.

² *Pickford v. Grand Junction Ry. Co.*, 12 M. & W. 766.

³ *Simpson v. London, &c. Ry. Co.*, *supra*.

⁴ *Hadley v. Baxendale*, 9 Exchq. 341. In *Horn v. Midland Ry. Co.*, 42 L. J. C. P. 59, L. R. 8 C. P. 131, the plaintiff had a contract to deliver goods in London, at a given date, at an exceptionally high price. Notice was given to the

station-master that they must be delivered at the given date, and if not so delivered, they would be thrown on the plaintiff's hands, but nothing was said about the exceptional character of the contract, or the unusually high price of the goods. The company failing to deliver within the time, it was held that they were not liable for the profit lost by the plaintiff under his contract by the exceptional price of the goods.

carrier had no notice that the profits of the mill would be thereby stopped, he would not be liable for the loss thereof.¹ And where the plaintiff, a clothier, sent a parcel of goods to his traveller at C., without notice to the company of the object for which the goods were sent, and their delivery was, through the company's negligence, delayed until after the traveller left C., and the plaintiff in consequence lost the profits which he would have derived from sales at C., it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover such profits as damages for the delay.²

In an action for delay in delivering skins for making gloves, the plaintiff was held not entitled to recover the loss in wages paid to workmen kept idle in consequence of their non-arrival.³ So a commercial traveller was not allowed his hotel expenses during two days which he had been delayed by the non-arrival of his case of goods sent by luggage train without any intimation of any kind respecting it;⁴ but reasonable costs incurred in searching and inquiring for the goods would be recoverable.⁵ No damages can be recovered which are incapable of being specifically stated and appreciated, as for instance, any inconvenience or vexation the plaintiff may have suffered.⁶

¹ *Hadley v. Baxendale, ante.*

² *Great Western Ry. Co. v. Redmayne*, L. R. 1 C. P. 329.

³ *Le Peintur v. South-Eastern Ry. Co.*, 2 L. T. N. s. 170.

⁴ *Woodger v. Great Western Ry. Co.*, L. R. 2 C. P. 318.

⁵ *Hales v. London, &c. Ry. Co.*, 4 B. & S. 66. In *Gee v. Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211, the plaintiffs were not allowed to recover loss of wages paid to work-people, and of profits they would have made, in consequence of their mill being stopped through failure of the company to deliver cotton within their usual time: for though they had communicated the fact of their mill being stopped, in consequence of non-delivery to the servants of the company at the place of destination, they had not done so at the time and place of delivery. In *Wilson v. Lancashire, &c. Ry. Co.*, 9 C. B. N. s. 632, where an action was brought against a company for damage for loss sustained by delay in delivery of cloth, by which the plaintiff, who was a cap-maker, lost the season for making it into caps, and so disposing of it, — it was

held that although the plaintiff could not recover his loss of profits, yet the jury might take into consideration the deterioration in the marketable value of the cloth by reason of the season having passed for making caps. In *Crouch v. Great Northern Ry. Co.*, 11 Exchq. 742, where a company refused to carry, at the ordinary rate, packed parcels for a carrier, whereby he was obliged to send them a more circuitous route at a greater expense, it was held that he was not entitled to recover damages for alleged loss of business, as the declaration was framed; but, *per MARTIN, B.*, if the fact had been that the plaintiff was a carrier whose business consisted in collecting goods to be forwarded by the defendants' railway, and the defendants designedly refused to carry his goods, which they were bound by law to do, in order to obtain a monopoly and destroy the plaintiff's business, — under such circumstances a jury would be justified in giving very heavy damages.

⁶ *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408; *Hobbs v. London, &c. Ry. Co.*, L. R. 10 Q. B. 111.

Where a peddler delivered goods at C. to be carried to S., and was told by the booking-clerk that the transit would take two days, and two days after, he called at S. and was told they had not arrived, and he received the same answer on several occasions during the nine days following,—it was held that he was entitled to throw the goods on the hands of the company and sue for the value.¹

The cases decided on claims for consequential loss seem to have established the following principles: that damages beyond the difference in market values will not be allowed unless the consequences of delay are communicated to or known by the company at the time and place of delivery to them; that only such loss can be recovered as was reasonably contemplated by both parties at the time the contract for carriage was made, and not loss arising out of circumstances then wholly unknown to the company; that damages will be given only for the reasonable and proximate, and not for the remote consequences of the breach of contract.²

¹ *Levene v. Great Western Ry. Co.*, 18 L. T. N. S. 295.

² *Redman on Railway Carriers*, 157, *et seq.*

CHAPTER XXIX.

MORTGAGES, BONDS, ETC.

SEC. 455. Power to make Mortgages, etc. restricted.	SEC. 467. Bonds of Railway Companies.
456. Legislative Authority to Mortgage.	468. Trustees, Relation of to Bondholders and Company: Powers and Duties of.
457. Statutory Provisions.	469. Removal, Appointment of, etc.
458. How Mortgages are generally made.	470. Foreclosure Proceedings.
459. Defective Mortgage.	471. Decrees in Foreclosure Proceedings.
460. Liens created by Statute.	472. Vacation of Decree.
461. Who may execute Mortgage.	473. Floating debt.
462. Non-payment of Interest.	474. Decrees ordering sale of Road in different States.
463. Convertible Bonds.	475. Statutory and other Liens.
464. What is covered by the Mortgage.	476. Sale of the Road and Property.
465. Fixtures.	477. Redemption.
466. Rolling-Stock.	

SEC. 455. Power to make Mortgages, etc., restricted. — It is now quite well settled that, without legislative authority, a railway company has no power to transfer its franchises, either absolutely or by way of mortgage,¹ or its railway or "permanent plant,"² because this

¹ *Troy, &c. R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Randolph v. Wilmington, &c. R. R. Co.*, 11 Phila. (Penn.) 502; *Stewart's Appeal*, 56 Penn. St. 413; *Hays v. Ottawa, &c. R. R. Co.*, 61 Ill. 422; *Arthur v. Commercial, &c. Bank*, 11 Miss. 394; *Black v. Delaware, &c. Canal Co.*, 22 N. J. Eq. 130; *State v. Mexican, &c. R. R. Co.*, 3 Rob. (La.) 513; *Com. v. Smith*, 10 Allen (Mass.), 448. But authority to borrow money and issue bonds for the construction of a railroad is held to carry with it an implied power to issue a mortgage upon its franchises and property to secure the same. *Louisville R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199. So a mortgage given without authority is validated by a subsequent recognition of it as a valid obligation by the Legislature. *Richards v. Merrimac, &c. R. R. Co.*, 44 N. H. 127; *Shepley v. Atlantic, &c. R. R. Co.*, 55 Me. 395; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Shrewsbury, &c. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. 113; *Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 8; *Winch v. Birkenhead, &c. Ry. Co.*, 5 De G. & S. 562; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114; *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. App. 201; *Troy, &c. R. R. Co. v. Boston, &c. R. R. Co.*, 86 N. Y. 107. But in some of the States it is held that a railroad company, having the implied power to borrow money for the construction of its road, has, unless restrained by statute,

² *Hart v. Eastern Union Ry. Co.*, 7 Exchq. 246.

would enable the company to deprive itself of the power to discharge its public duties and to transfer to another the right to exercise those functions and privileges which the Legislature had conferred upon it.¹ But while this is the rule as to all real estate acquired under the right of eminent domain, or other lands owned by it which are indispensable for the purposes of its business, yet it does not apply to lands which are acquired by it by purchase, and are not necessary for its purposes in building and operating its road.²

SEC. 456. Legislative Authority to Mortgage. — Where, as is now generally the case, the charters of these companies or the general statute confers authority upon these companies to mortgage their property and franchises for certain purposes, there can of course be no question as to their authority to mortgage; but where the authority is restricted to a certain purpose, no power exists to mortgage for any other purpose.³ And where express power to mortgage is conferred, it is said that an implied authority to mortgage for that purpose is thereby negatived;⁴ but this is hardly believed to be accurate,⁵ unless the statute expressly or by clear inference

authority to secure the payment thereof by a mortgage of its property. *Kelly v. Alabama, &c. R. R. Co.*, 58 Ala. 489; *Savannah, &c. R. R. Co. v. Lancaster*, 62 Ala. 555; *Comm'rs, &c. v. Atlantic, &c. R. R. Co.*, 77 N. C. 289. Authority to make a mortgage carries with it the power to make it with the usual conditions embraced in such conveyances. *Savannah, &c. R. R. Co. v. Lancaster, ante*. But it does not authorize unusual provisions, — as that the company shall pay the attorney-fees of the mortgagees in a suit upon the mortgage. *Pacific Rolling Mill Co. v. Dayton, &c. R. R. Co.*, 5 Fed. Rep. 852; 5 Sawyer (U. S. C. C.), 61; *Jessup v. City Bank, &c.*, 14 Wis. 331.

¹ *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 517; *Pierce v. Emery*, 32 N. H. 484; *Carpenter v. Black Hawk, &c. Co.*, 65 N. Y. 43; *Wood v. Bedford, &c. R. R. Co.*, 8 Phila. (Penn.) 94; *Pullan v. Cincinnati, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 35; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Atkinson v. Marietta, &c. R. R. Co.*, 15 Ohio St. 21.

² *Tucker v. Ferguson*, 22 Wall. (U. S.) —; *Hendee v. Pinkerton*, 14 Allen

(Mass.), 381; *Farnsworth v. Minnesota, &c. R. R. Co.*, 92 U. S. 49. There is a class of cases which hold that for the purpose of its regular business a corporation may mortgage its property; but these cases are exceptional, and are not generally followed. *Kennebec, &c. R. R. Co. v. Portland, &c. R. R. Co.*, 59 Me. 9; *Shepley v. Atlantic, &c. R. R. Co.*, 55 Me. 595; *White Water, &c. Canal Co. v. Vallette*, 21 How. (U. S.) 414.

³ *Grand Junction R. R. Co. v. Bickford*, 23 Grant's Ch. (Ont.) 302. But where from the general tenor of the statute it is evident that the Legislature intended to authorize a railway company to mortgage all its property, it will be held — unless a contrary intention appears from the tenor of the mortgage itself — that it embraces all the property of the company. *Coe v. Midland, &c. R. R. Co.*, 31 N. J. Eq. 105.

⁴ *In re Pooley Hall Colliery Co.*, 21 L. T. N. s. 690.

⁵ *Mobile, &c. R. R. Co. v. Talman*, 15 Ala. 472; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Uncas National Bank v. Roth*, 23 Wis. 339; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431.

takes away such implied authority. Authority to mortgage need not be given in express terms, but may be inferred where there is a reasonable ground for such an inference.¹ Thus, a power to *sell* the property is held to include the power to mortgage its property but not its franchises.² But the question as to whether a statute which merely authorizes a corporation to mortgage its property can be said to include a right to mortgage its franchises is not definitely settled, but the better opinion would seem to be that it does not.³ But a mortgage by which a corporation undertakes to mortgage both its property and franchises may be good as to the property although invalid as to the franchises.⁴ Of course, a mortgage invalid in its inception, for want of legislative authority, may be validated by subsequent legislation to that end,⁵ as the public alone is affected by such transfer, and the Legislature has ample authority to waive it by a subsequent act.⁶

SEC. 457. Statutory Provisions. — In most of the State statutes authority is given railway companies to mortgage their property and franchises, either generally or for certain specified purposes; and where no such general provision is incorporated into the statute, it is now generally conferred by a special provision in the charter. Where this authority is conferred, subject to certain limitations or conditions, they must be fully complied with, in order to come within the authority of the statutes.

SEC. 458. How Mortgages are generally made. — Mortgages of railway property and franchises, to secure the payment of bonds, or even of general indebtedness, are now almost universally made to trustees, who take and hold the title for the benefit of the bondholders or other creditors for whose benefit it was given, and the mortgage is treated as a contract between the company and all persons who then are or thereafter may become holders of its bonds or

¹ *East Boston Freight R. R. Co. v. Eastern R. R. Co.*, 18 Allen (Mass.), 422.

² *McAllister v. Plant*, 54 Miss. 106. Authority to sell or mortgage all the property of a corporation includes authority to sell or mortgage a part of it. *Pullan v. Cincinnati, &c. R. R. Co.*, *ante*.

³ *Pollard v. Maddox*, 28 Ala. 321; *Dunham v. Isett*, 15 Iowa, 284; *Pullan v. Cincinnati, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 35. But see *Pierce v. Milwaukee, &c. R. R. Co.*, 24 Wis. 451; *McAllister v. Plant*, *ante*.

⁴ *Central Gold Mining Co. v. Platt*, 3 Daly (N. Y. C. P.), 263.

⁵ *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414; *Shaw v. Norfolk Co. R. R. Co.*, 5 Gray (Mass.), 162; *Shepley v. Atlantic, &c. R. R. Co.*, 55 Me. 395.

⁶ *Hatcher v. Toledo, &c. R. R. Co.*, 62 Ill. 477. A mortgage of a railroad in one State is not invalid because executed in another State. *Hadder v. Kentucky, &c. R. R. Co.*, 7 Fed. Rep. 793.

other obligations the payment of which it is given to secure.¹ As a rule, these mortgages contain a power of sale upon a breach of the conditions, and in such cases the trustees may, where the power is expressly and definitely conferred upon them, but not otherwise, sell the property without resorting to legal proceedings;² but as a rule, owing to the nature of the property and the interests and the perils involved, a resort to a court of equity to foreclose the mortgage will be the safer and more desirable course.

SEC. 459. Defective Mortgage.—Where a railway company attempts, through its proper officers, to execute a mortgage upon its property and franchises, under a proper authority, although the instrument is not so executed that it can take effect as a deed, yet it will be treated as an equitable mortgage, so as to give the holders of the obligations which it was intended to secure the full benefit of its provisions. Thus, in a Vermont case,³ the Rutland and Washington Railway Company attempted to execute a mortgage to trustees, — Daniel S. Miller and Shepherd Knapp, — to secure the payment of certain bonds to be thereafter issued. The company authorized its president, Merritt Clark, to execute such mortgage, which he did in his own name, and sealed it with his own seal instead of the seal of the company. A second mortgage and third were subsequently issued to other trustees, to secure other indebtedness; and the company having made default as to the payment of the first bonds, the trustees of the first bonds brought a bill in equity to foreclose the mortgage. Thereupon the holders of the second and third mortgage, which was properly executed, intervened, and set up their claim to a prior lien upon the property, by reason of the defects in the execution of the first mortgage; but the court held that the first instrument operated as an equitable mortgage, as against the trustees of the last two mortgages, who were found to be affected with notice and knowledge of the execution and existence of the first mortgage. So it has been held that informal instruments, as bonds, issued and expressly made a lien upon the property,⁴ or a mortgage which is neither executed nor recorded according to the requirements

¹ *Butler v. Rahm*, 46 Md. 541.

² *Mason v. York, &c. R. R. Co.*, 52 Me. 82.

³ *Miller v. Rutland, &c. R. R. Co.*, 36 Vt. 452.

⁴ *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414. If the

mortgage is defective in any of its terms, it will be reformed upon proper application. In one case this was done so as to convey the title to the fee to the trustees, when such was the obvious intention of the mortgagors. *Randolph v. New Jersey, &c. R. R. Co.*, 28 N. J. Eq. 49.

of law are valid as against a subsequent mortgage, which is in express terms made subject to such defective mortgage.¹

SEC. 460. *Liens created by Statute.*—A lien in the nature of a mortgage may be created by statute, and attach in favor of certain classes of indebtedness, without any writing whatever; as where the statute authorizes the issue of bonds by the company, and provides that such bonds shall be a lien upon the railway and all its property and franchises. In such a case it is evident that no formal mortgage, or indeed any writing whatever, is necessary to secure the payment of such bonds, as the law has virtually made each bond a mortgage, and has dispensed with all formalities.² And this is so even though the bonds make no mention of a lien, and do not in any manner refer to the act under which they are issued.³ But in order to operate as a lien, the statutory provision conferring it must do so clearly and expressly.⁴ This class of mortgages is held to cover all the "property" of the company, whether used for the construction or operation of the road or not,⁵ and also after-acquired property, as well as that in hand when the bonds were issued.⁶ Such a lien may be waived,⁷ but it cannot be discharged by the holder otherwise than by its payment or surrender, so as to deprive a subsequent holder of the benefit of the lien, because it is not given in favor of any particular person, *but runs with the bond* in favor of any legal holder thereof.

SEC. 461. *Who may execute Mortgage.*—If the statute authorizing the issue of a mortgage makes provision as to who shall execute it, or how it shall be executed, the statute must be followed; but where—as is usually the case—the statute is silent upon this point, the directors of the company may not only authorize the issue of a mortgage, but also may execute it, or authorize one of their number—usually the president—to execute it.⁸ The directors

¹ *Coe v. Columbus, &c. R. R. Co.*, 10 Ohio St. 372.

² *Woodson v. Murdock*, 22 Wall. (U. S.) 351; *Wilson v. Boyce*, 92 U. S. 320; *Murdock v. Woodson*, 2 Dill. (U. S. C. C.) 539; *State v. Florida, &c. R. R. Co.*, 15 Fla. 690.

³ *Dundas v. Desjardins, &c. R. R. Co.*, 17 Grant (U. C.), 27.

⁴ *Cincinnati v. Morgan*, 3 Wall. (U. S.) 275; *Collins v. Central Bank, &c.*, 1 Kelly (Ga.), 435; *Brunswick, &c. R. R. Co. v. Hughes*, 52 Ga. 557.

⁵ *Wilson v. Boyce, ante*.

⁶ *Whitehead v. Vineyard*, 50 Mo. 30.

⁷ *Ketcham v. Pacific R. R. Co.*, 4 Dill. (U. S.) 74.

⁸ *Ohio, &c. R. R. Co. v. McPherson*, 35 Mo. 13; *Arms v. Conant*, 36 Vt. 744; *McCurdy's Appeal*, 65 Penn. St. 290; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Wright v. Bundy*, 11 Ind. 398. The mortgage should specifically and accurately describe the bonds which it is intended to secure. *Butler v. Rahm*, 46 Md. 541. The mortgage may

alone, without a vote of the stockholders, may authorize a mortgage to be made; and even though there is any question as to their authority, the validity of the mortgage, as against the corporation, is established by its affirmance of it by the issue of bonds under it.¹

SEC. 462. Non-payment of Interest. — A railway mortgage is to be construed according to its terms; and if there is a provision that, if default shall be made in the payment of principal or interest, the bonds shall become due and payable, it may be foreclosed. But if the statute under which the bonds are issued provides that the bonds shall not be payable in less than a certain period, which has not elapsed, such a provision in the mortgage would be ineffectual; but the mortgage may be foreclosed for the breach in the payment of interest, and the decree should direct a sale of the road in case the terms of the decree are not complied with; and the balance, after paying the interest and expenses, will be held by the court to pay the after-accruing principal and interest, the mortgagees having a lien upon the fund for that purpose.² The holders of bonds which have not matured cannot be compelled to accept the amount thereof before they mature, and neither the Legislature nor the courts can compel them to do so, or deprive them of their lien under the mortgage.³

SEC. 463. Convertible Bonds. — Where, upon the face of the bonds, there is a provision that the holder may convert the bonds into stock of the company upon certain terms, the holder may do so at his option, or he may retain his bonds and the lien under the mortgage for their payment. The right of conversion runs with the bond, and cannot be assigned except by an assignment of the bond.⁴ Even though the bonds do not upon their face contain any provision making them convertible, yet, if under the statute the company has authority to issue additional stock, the company may give to the bondholders the option to convert them into stock. And where

be so drawn that the company may create a prior lien upon the property. But in order to retain this power, it must be specifically and clearly expressed in the mortgage. *Campbell v. Texas, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 263.

¹ *McNulty's Appeal*, *ante*; *Hadder v. Kentucky, &c. R. R. Co.*, 7 Fed. Rep. 793. If the act authorizing a mortgage requires the concurrence of a majority of the stockholders, it is held that a non-

compliance with this requirement is one in which the public have no interest. *Thomas v. Citizens' Horse R. R. Co.*, 104 Ill. 462.

² *Howell v. Western R. R. Co.*, 94 U. S. 463.

³ *Randolph v. Middleton*, 26 N. J. Eq. 543.

⁴ *Denny v. Cleveland, &c. R. R. Co.*, 23 Ohio St. 108; *Sutleff v. Cleveland, &c. R. R. Co.*, 24 id. 147.

convertible bonds are lawfully issued, it has been held that they may be converted into stock, even though the maximum limit of the capital stock under the charter or general law has been reached.¹ The authority of this case has been doubted, but it would be exceedingly difficult to establish a contrary rule.

SEC. 464. What is covered by the Mortgage. — The question as to what property is covered by a mortgage is purely one of construction, and depends entirely upon the language used, and the obvious intention of the parties to be gathered therefrom, and the authority under which it was issued. If the statute specifies what property may be mortgaged, of course the mortgage can embrace no other property; but as a rule, acts authorizing the issue of a mortgage by a railway company are broad enough to embrace any property which the company may own, so that the question as to what is embraced in it is usually one depending upon a fair construction of the mortgage itself, and the same rules of construction apply as are applied to the deeds of individuals. A formal mortgage is not in all cases necessary, as the Legislature may provide that certain obligations issued by a company shall be a mortgage upon its property to secure the payment of such obligations, and in that case they have all the force of a mortgage, and the act itself applied to the existing condition of the road determines the character and extent of the lien.² A mortgage of the property of a railroad company which is specifically designated, which also contains a clause embracing "all other corporate property, real and personal, of said railroad company, belonging or appertaining to said railroad, whether then held or owned, or thereafter acquired," was held not to apply to or embrace a tract of land afterwards acquired by the company, which was not used in connection with the road, but was laid out into town lots.³

¹ *Belmont v. Erie R. R. Co.*, 52 Barb. (N. Y.) 637.

² *State v. Florida, &c. R. R. Co.*, 15 Fla. 690.

³ *Calhoun v. Memphis, &c. R. R. Co.*, 2 Flip. (U. S. C. C.) 442. In England a mortgage of an "undertaking" does not include the land of a railway company. *Doe v. St. Helen's, &c. Ry. Co.*, 2 Eng. Ry. & Can. Cas. 756. Nor does a mortgage conveying the "said undertaking, and all and singular the rates, tolls, and other sums arising," convey the land to the mortgagees. *Myatt v. St. Helen's Ry.*

Co., 2 Q. B. 364. But where the governing body of the corporation, in a resolution authorizing an issue of bonds to raise money, provide for the execution of a deed of trust to secure the same, on its right of way, roadbed, etc., "and on all the real and personal property now and hereafter belonging to the company," this necessarily includes the earnings and profits, and authorizes a trust deed conveying the tolls, freights, rents, incomes, etc. *Kelly v. Alabama, &c. R. R. Co.*, 58 Ala. 489. Machinery used for making nails was held to be fixtures and included in a mortgage.

The ground upon which this doctrine proceeds is that the grant was limited by the word "appertaining" to such property as belongs to and is an essential part of the franchise, so that it cannot be established or withdrawn at the pleasure of the company. And the same rule has been applied in the case of a mortgage of a railway "with its corporate privileges and appurtenances."¹ So it has been held that such a mortgage does not embrace woodland,² or land purchased for a certain specific use of the road, as for depots, shops, etc., but which has not actually been applied to that purpose.³ Rights of action, legal or equitable, may be the subject of mortgage, but they

Delaware, &c. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452. It is held in Alabama that the franchise which a railroad company transfers by its mortgage is not its franchise to exist as a corporation, but only such of its franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of the property which the company itself had; especially when the charter merely authorizes the company to mortgage "its means, property, and effects," without express mention of franchises. *Meyer v. Johnston*, 53 Ala. 237. A mortgage made to secure the payment of specific bonds is for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder. *Rice v. Southern Penn. R. R. Co.*, 9 Phila. (Penn.) 294. A railway company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works. *Gardner v. London, &c. Ry. Co.*, L. R. 2 Chan. App. 201. Where a railway company, executing a mortgage upon its road as contemplated, has no legal title to any of the right of way, but only contracts for a small portion thereof, to be conveyed upon conditions which it never performs or has agreed to perform, and a new company is organized, which builds the road and acquires the legal title to most of the right of way and is equitably entitled to the balance, no decree of foreclosure can be sustained under the mortgage, as against the new company, for the sale of its property. The mortgage creditors of such original company have no rights superior to the company itself. In such case the original

company has no such interest or title in the road as can be subjected to sale under the mortgage. *Chicago, &c. R. R. Co. v. Loewenthal*, 93 Ill. 433. A railroad mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises, and to convey to the purchaser "all the estate, right, property, and interest, and to the same extent as the railroad company had therein at the date of the mortgage," etc., will be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution. *Coe v. N. J. Midland R. R. Co.*, 31 N. J. Eq. 105; *Randolph v. N. J. West Line R. R. Co.*, 28 N. J. Eq. 49.

¹ *Shamokin Valley R. R. Co. v. Livermore*, 47 Penn. St. 365.

² *Dinsmore v. Racine, &c. R. R. Co.*, 12 Wis. 649.

³ *Youngman v. Elmira, &c. R. R. Co.*, 65 Penn. St. 278. In *Parish v. Wheeler*, 22 N. Y. 494, canal boats belonging to a railway company, but which were beyond its *terminus*, although accessory to its business, were held not to belong or appertain to the road in such a sense that they would pass under a clause in a mortgage conveying all property belonging or appertaining to the road, unless they were expressly specified. But it was held that they would pass under a general clause embracing "*all other personal property whatsoever, in any way*" belonging or appertaining to said railroad, as in the latter case the intention of the parties to convey the boats is clear.

must be specifically named in the mortgage, and do not pass under a general clause embracing "all personal property."¹

If the mortgage specifically enumerates certain personal property as embraced in the mortgage, all other kinds of personal property are excluded.² Therefore, in drawing up mortgages care should be exercised not to refer specifically to particular articles of personal property, unless other words are used which show that such specific description is not intended to exclude other kinds of personal property. There is now no question but that a railway company may include in a mortgage of its railway and appendages property to be thereafter acquired.³ But the question as to whether after-acquired property is embraced in a mortgage of a railroad and its franchises, without express words to that effect, is of great importance. In some of the States it has been held that a railroad and its franchises are a unity, making an indivisible whole, and consequently that a mortgage covering these, without any express words to that effect, must necessarily embrace and attach to all property subsequently acquired for its use, upon the ground that it is an incident of the principal thing conveyed.⁴ But this doctrine, resting upon the

¹ Milwaukee, &c. R. R. Co. v. Milwaukee & Western R. R. Co., 20 Wis. 174.

² Brainerd v. Peck, 34 Vt. 496. In Smith v. McCullough, 104 U. S. 25, a mortgage was executed upon its then and thereafter-to-be-acquired property, which was specifically named. It was held that certain municipal bonds issued to aid in the building of the road, which were not embraced in the description, were not covered by the mortgage. In Morgan v. Donovan, 58 Ala. 241, the charter empowered the company to construct and operate a line between Mobile and New Orleans, and to acquire and hold such real property "as may be necessary and convenient for the construction, maintenance, and management of the railroad," and also to acquire "any steamboats, piers, wharves, and the appurtenances thereunto belonging, that the directors may deem necessary, etc., to own, use, and manage in connection with said railroad." In deeds of trust, executed by the corporation, the words of conveyance were qualified by clauses like the following: "The lands occupied by said railroad, or hereafter acquired, owned, and occupied, . . . including all depots, etc., now

owned and occupied, or hereafter acquired in connection with said portion of said railroad, situate upon or lying within the limits of said cities or upon or adjacent to said portion of said railroad, and the route and line thereof." In another mortgage or deed of trust the conveyance was qualified as follows: "All depots, station-houses, wharves, and warehouses now owned and occupied, or hereafter to be acquired and used in connection with its said railroad, together with all steamboats and personal property used, or hereafter to be used, exclusively for the constructing, maintaining, operating or conducting the business of its said railroad." It was held that the mortgage covered property *useful and necessary* in the operation of the railway, but that property bought of a steamship line to stifle competition was not necessary, and therefore was not included in the mortgage.

³ Coopers v. Wolf, 15 Ohio St. 523; Ludlow v. Hurd, 1 Dis. (Ohio) 552; Dunham v. Cincinnati, &c. R. R. Co., 1 Wall. (U. S.) 254; Coney v. Pittsburgh, &c. R. R. Co., 3 Phila. (Penn.) 173.

⁴ Dinsmore v. Racine, &c. R. R. Co., 12 Wis. 649; Ludlow v. Hurd, 1 Dis.

doctrine of accession, can only apply to such accessions to the principal thing as were embraced within the franchises of the company, or its legislative authority, existing at the time when the mortgage was made, and cannot upon any line of reasoning or equitable ground be extended to property acquired under legislative authority subsequently obtained. Thus, if by its charter or other legislative act, at the time when the mortgage was executed, the company had authority to construct certain branch roads, the mortgage will cover such branch roads when constructed;¹ but if

(Ohio) 552; *Pennock v. Coe*, 23 How. (U. S.) 117; *Shaw v. Bill*, 95 U. S. 10; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Pierce v. Emery*, 37 N. H. 410.

¹ *Seymour v. Canandaigua, &c. R. R. Co.*, 25 Barb. (N. Y.) 284. In *Pittsburgh, &c. R. R. Co. v. Indianapolis, &c. R. R. Co.*, 8 Biss. (U. S. C. C.) 456, it was held that a mortgage upon a railway did not preclude the company from executing a lease of its road and property. In this case the lease was executed to an Ohio corporation for the purpose of forming a through connecting line of travel and traffic, and it was held not to be void as being opposed to public policy. It was also held not to be essential to the validity of such a lease, in the absence of express statutory provision, that its original execution, or subsequent ratification, should have been evidenced by corporate action taken by the lessor within the limits of the State by which it is created. Also, that an unexecuted decree for the sale of a portion of the demised railroad, for the purpose of satisfying a mortgage made prior to the lease, is not such an eviction of the lessee, by paramount title, as to terminate the lease. Nor is the appointment of receivers for the lessor corporation, but with instructions not to disturb the possession of the lessee. A stipulation by the lessor corporation to arrange, provide for, adjust, and classify its indebtedness was held to be one of substance, which it must perform; and the lessee was not bound to wait an unreasonable time for such classification of the lessor's indebtedness to be effected. But where the lessee has acted under the lease before such classification, the court

will not decree a rescission of the contract upon the application of such lessee until the lessor is given a reasonable time within which to comply with the stipulation. In a well-considered case this question was passed upon, and the court held that a mortgage upon "all the property owned or which may hereafter be acquired" by a railway company was held not to apply to lands subsequently acquired under legislative authority, which the company had at that time no authority to acquire, as such lands cannot be said to come within the contemplation of the parties. *Meyer v. Johnston*, 53 Ala. 237. In a case before the United States Circuit Court—*Calhoun v. Memphis, &c. R. R. Co.*, 2 Flap. (U. S. C. C.) 442—it was held that under a general mortgage of a railway, after-acquired land does not pass unless it is used in connection with the actual operation of the road and as a part of it. And it was also held to be the rule even though the mortgage extended to "the railroad then constructed and to be constructed, and all other corporate property real and personal of said railroad company, belonging or appertaining to said railroad, whether then owned or thereafter to be acquired." But a contrary doctrine was held in *Hamlin v. European, &c. R. R. Co.*, 72 Me. 83. In that case it was held that such a mortgage operates upon the inchoate right of the company to a conveyance of lands under contracts subsequently made, as soon as the contracts are made and the company is in possession under them for the purposes of its charter, although the road is not built to such lands, and the right to use them in direct connection with the road without further legislative authority has expired.

authority to build such branch roads was acquired by a grant obtained *subsequent* to the execution of the mortgage, they will not pass;¹ and this rule would apply to railroad companies organized under general statutes. The mortgage follows and attaches to any property which is an accession to the thing granted, which is embraced within the powers of the company as they existed when the mortgage was executed. Consequently, if the company under its charter has authority to change its location, it is held that the mortgage attaches to lands taken by it for such new location, and also to the new road built thereon, as well as all its appendages;² and this would undoubtedly be the rule where the location of the road is changed at certain points, even though the mortgage does not in terms apply to after-acquired property, as it would be unjust and inequitable to permit a railway, by changing the line of its road, to free that portion of it from the lien of the mortgage;³ and so long as the road is kept within the general plan the mortgage attaches to it;⁴ but according to the case last cited, and upon principle, the lien would be discharged upon that portion of the line which has been abandoned.

Where a mortgage embraces "after-acquired" property, it is held to include a lease of another road taken by the company,⁵ and in some instances has been held to apply to the net earnings of the road,⁶ while in other cases it has been held — and, as we believe, correctly — that the mortgage does not apply to such net earnings unless so applied in express terms.⁷ So such a mortgage is held to cover the capital stock of another railway company, purchased by the mortgagor subsequent to the execution of the mortgage;⁸ but it does not include unpaid

¹ Meyer v. Johnston, 53 Ala. 237.

² Seymour v. Canandaigua, &c. R. R. Co., 25 Barb. (N. Y.) 284. See also Shaw v. Bill, 94 U. S. 10.

³ Elwell v. Grand St., &c. R. R. Co., 67 Barb. (N. Y.) 83.

⁴ Meyer v. Johnston, 53 Ala. 237.

⁵ Buck v. Seymour, 46 Conn. 156.

⁶ Addison v. Lewis, 75 Va. 701; Tompkins v. Little Rock, &c. R. R. Co., 15 Fed. Rep. 6. There is now no question but that a railway company may pledge its net earnings, but so long as they remain in the hands of the mortgagor they are subject to trustee process in favor of the general creditors of the road. Gilman v. Illinois, &c. R. R. Co., 91 U. S. 603; Galveston R. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Missis-

sipi, &c. R. R. Co. v. U. S. Express Co., 81 Ill. 254; Smith v. Eastern R. R. Co., 124 Mass. 154; Bath v. Miller, 51 Me. 341; Noyes v. Rich, 52 Me. 115; Galena, &c. R. R. Co. v. Menzies, 26 Ill. 121; Ellis v. Boston, &c. R. R. Co., 107 Mass. 1; Emerson v. European, &c. R. R. Co., 67 Me. 387; Dunham v. Isett, 15 Iowa, 284; Clay v. East Tenn., &c. R. R. Co., 6 Heisk. (Tenn.) 421. Only the *net* earnings, after the payment of operating expenses, can be pledged. Parkhurst v. Northern Central R. R. Co., 19 Md. 472.

⁷ Emerson v. European, &c. R. R. Co., 67 Me. 387; De Graff v. Thompson, 24 Minn. 452; Pullan v. Cincinnati, &c. R. R. Co., 5 Bias. (U. S. C. C.) 237.

⁸ Williamson v. N. J. Southern R. R. Co., 26 N. J. Eq. 398.

subscriptions to the capital stock of the company.¹ Land grants to a railway company do not pass under a mortgage of its railway and after-acquired property, although expressly named, until the company has earned them, or, in other words, until it has performed the conditions which entitles it to receive them.² Nor does the term embrace a grant of land which the company has no power to accept.³ Indeed, a mortgage of after-acquired property can only attach itself to property in the condition in which it comes to the mortgagor's hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires.⁴ When a railroad company has authority to purchase, and does purchase, a railroad lying within its chartered limits, the road so purchased becomes subject to a mortgage executed by the purchasing railroad company upon its line of road, completed and to be completed, but not to the prejudice of mortgages previously executed on the railroad so purchased.⁵ Where a railroad company mortgaged its main line of railroad from the eastern terminus thereof to its western terminus, and the lands for the main line, and the franchises acquired and to be acquired pertaining to the main line, it was held that it did not embrace lands and franchises acquired by and under a subsequent act of the Legislature authorizing an extension of the road.⁶ The fact that a portion of the road, not built when the deed of trust was executed, was afterwards constructed, not on the route then surveyed and located, but on another route in the general direction authorized by the charter and amendments, does not deprive the holders of bonds secured by the trust deeds on the road to be constructed of the right to a first lien on it.⁷ A mortgage of a railway and its after-acquired property only attaches to such property as is regularly acquired by it, and does not extend to property obtained by it by fraud, so that the title thereto does not vest in it,⁸ or to property acquired by it illegally and without authority.

¹ *Dean v. Biggs*, 25 Hun (N. Y.), 122.

² *Campbell v. Texas, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 263.

³ *Meyer v. Johnston*, 53 Ala. 237.

⁴ *Williamson v. N. J. Southern R. R. Co.*, 28 N. J. Eq. 277; *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311; *Haven v. Emery*, 33 N. H. 66.

⁵ *Branch v. Atlantic, &c. R. R. Co.*,

3 Woods (U. S. C. C.), 481.

⁶ *Randolph v. N. J. West Line R. R. Co.*, 28 N. J. Eq. 49. See *Coe v. N. J. Midland R. R. Co.*, 31 N. J. Eq. 105.

⁷ *Meyer v. Johnston*, 53 Ala. 237.

⁸ *Williamson v. N. J. Southern R. R. Co.*, *ante*; *Field v. Post*, 38 N. J. Eq.

SEC. 465. **Fixtures.** — The same rule as to fixtures applies in the case of a mortgage of a railway as applies in the case of a mortgage by an individual, and everything which properly comes under that head passes under the mortgage although it is subsequently severed from the freehold. Thus, a mortgage of a railroad and all its property, real and personal, includes and covers old iron rails, etc., taken up from the road as useless and replaced by new ones,¹ and also new rails purchased to be laid upon the road, but which have not been actually laid.² But where a track is laid merely for temporary purposes, as to obtain gravel from a pit, or to take stones from a quarry, or to take freight to a certain point, it becomes no part of the railway and does not pass under a general mortgage of the railroad.³ Nor do tools and other implements used in repairing the railway or its appliances, but not attached to the realty, pass under such a mortgage,⁴ nor coal, wood, or other materials used for fuel,⁵ nor an iron safe,⁶ nor office furniture.⁷

SEC. 466. **Rolling-Stock.** — Whatever may be the rule as to engines, cars, and that species of property indispensable to the operation of the road, so far as third persons are concerned, there is no question but that, as between the parties thereto, a mortgage thereof is effectual to pass the title to the mortgagees. But the question as to whether or not the rolling-stock is to be regarded as a fixture or as personal property has been variously decided. In several States rolling-stock essential to the operation of the road, as cars, engines, etc., is held to be affixed thereto so as to pass under a mortgage of

346; *Frazier v. Frederick*, 23 N. J. Eq. 162.

¹ *Salem Bank v. Anderson*, 75 Va. 250. Iron rails, spikes, ties, etc., are held to constitute a part of the realty and to pass under a mortgage. Also cast-off articles, as broken rails, etc., are held to be included therein if a proper administration of the business would require that they should be recast. But tools, implements in workshops, and furniture in stations, are held to be mere personalty and not subject to the lien of a mortgage. *Lehigh, &c. Co. v. Central R. R. Co.*, 35 N. J. Eq. 379. But as to office furniture, etc., see *Ludlow v. Hurd*, 1 Dis. (Ohio) 552.

² *Wutjen v. St. Paul, &c. R. R. Co.*, 4 Hun (N. Y.), 529. In this case the company was enjoined from selling or pledging such rails under a resolution of

the board of directors. *Palmer v. Forbes*, 23 Ill. 301. But see *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207, where a contrary doctrine was held as to chairs intended for fastening down the rails, but which were never used for that purpose. See, also, affirming this doctrine, *Farmers' Loan, &c. Co. v. Same*, 15 Wis. 524; *Farmers' Loan, &c. Co. v. Cary*, 13 Wis. 110; *Dinsmore v. Racine, &c. R. R. Co.*, 12 Wis. 649; also *Brainerd v. Peck*, 34 Vt. 496.

³ *Van Keuren v. Central R. R. Co.*, 38 N. J. L. 165.

⁴ *Williamson v. N. J. Southern R. R. Co.*, *ante*.

⁵ *Hunt v. Bullock*, 23 Ill. 320. But see *Coe v. McBrown*, 22 Ind. 252, *contra*.

⁶ *Titus v. Mabee*, 25 Ill. 257.

⁷ *Hunt v. Bullock*, *ante*.

the railroad,¹ and not to be subject to levy or sale upon execution.² But in New York,³ New Jersey,⁴ New Hampshire,⁵ and Ohio,⁶ it is

¹ *Buck v. Memphis, &c. R. R. Co.* (Tenn.) 4 Cent. L. J. 430; *Williamson v. N. J. Southern R. R. Co.*, 28 N. J. Eq. 277; *Reversed*, 29 id. 311; *Palmer v. Forbes*, 23 Ill. 301; *Minnesota Co. v. St. Paul Co.* 6 Wall. (U. S.) 142. But the mortgagee takes the property subject to all valid liens. Thus, where a contract between A. and a railroad company for furnishing it cars provides that they shall be his property until paid for, a pre-existing mortgage by the company of all its then property, or that which it might thereafter acquire, does not subordinate the claim of A. for the price of the cars to the lien of the mortgagees. *Fosdick v. Car Co.*, 99 U. S. 256; *Fosdick v. Schall*, 99 U. S. 235; *Hall v. Frost*, 99 U. S. 389; *Huidekoper v. Locomotive Works*, 99 U. S. 258. See *Coe v. N. J. Midland R. R. Co.*, 31 N. J. Eq. 105. Such conditional sales of personal property are valid in Missouri. *Rogers Locomotive Works v. Lewis*, 4 Dillon (U. S. C. C.), 158. An instrument conveying certain cars construed to be a mortgage and not a conditional sale, and therefore held to require registry, under the Missouri statute, to protect the property therein mentioned from the creditors of the grantee. *Heryford v. Davis*, 2 Am. & Eng. R. R. Cas. (U. S. S. C.) 386. A mortgage may cover office furniture. *Raymond v. Clark*, 46 Conn. 129. In Illinois it is held that the real owner of personal property, who vests another, to whom it is delivered, with an interest therein, must, if desirous of preserving a lien on it, comply with the requirements of the chattel-mortgage act of that State. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664. And it

seems that a chattel mortgage upon after-acquired goods will hold against a purchaser with notice; he can acquire no better title than his vendor. *Robson v. Michigan Central R. R. Co.*, 37 Mich. 70. In Pennsylvania it is held that mortgages of personal property of a railway company, out of possession, are to be postponed to creditors who have obtained a lien by judicial process. *Merchants' Bank v. Petersburg R. R. Co.*, 12 Phila. (Penn.) 482. A chattel mortgage on the equipment of a railroad was made by authority of the board of directors of an insolvent corporation for securing the claims of directors against the corporation, and it was held that it was invalid as against prior mortgagees of the franchise and equipment, whose mortgages were not filed, because the directors, who were also stockholders, had notice of the prior mortgages. Such prior mortgages, however, were held not to be valid against judgment creditors, who, but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a valid levy on the equipment. *Coe v. New Jersey Midland R. R. Co.*, 31 N. J. Eq. 105. In New Jersey it is held that a mortgage executed by a railroad corporation on its road-bed and franchises, together with its engines, cars, and rolling-stock, so far as regards the latter class of property, is a chattel mortgage within the provisions of the act concerning chattel mortgages. *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311. Rolling-stock does not necessarily become fixed to the railroad upon which it is placed. Therefore, a mortgage, although in terms covering future acquisitions of

² *Gue v. Tide Water Co.*, 24 How. (U. S.) 257; *Youngman v. Elmira, &c. R. R. Co.*, 65 Penn. St. 278; *Shamokin Valley R. R. Co. v. Livermore*, 47 Penn. St. 465; *Coney v. Pittsburgh, &c. R. R. Co.*, 8 Phila. (Penn.) 173; *Macon, &c. R. R. Co. v. Parker*, 9 Ga. 377; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431.

³ *Randall v. Elwell*, 52 N. Y. 591;

Hoyle v. Plattsburgh, &c. R. R. Co., 54 N. Y. 314; *Stevens v. Buffalo, &c. R. R. Co.*, 31 Barb. (N. Y.) 590.

⁴ *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311.

⁵ *Boston, &c. R. R. Co.*, 37 N. H. 410.

⁶ *Coe v. Columbus, &c. R. R. Co.*, 10 Ohio St. 372.

treated as personal property, and, as such, subject to levy and sale upon execution unless it has passed into the possession of the mortgagees. In some of the States the constitution expressly provides that it shall be regarded as personal property, — as in Arkansas, Illinois, Missouri, Nebraska, Texas, and West Virginia, — while in others it is expressly provided by statute that a mortgage of the property of a railroad company, embracing personal property, shall be recorded in certain offices, and when so recorded shall be effectual to pass the title to the mortgagee as against the creditors of the company. Consequently, in determining the force which the decisions of one State upon this question should have in another, the statutory and constitutional provisions (if any) relative thereto should be looked to.

SEC. 467. Bonds of Railway Companies. — Mortgages of railways are usually given to secure the payment of certain bonds issued by the company, and when made payable to order or bearer they are

rolling-stock, does not attach to the rolling-stock of a third person subsequently placed on the road under a contract with a company then operating it. *Hardesty v. Pyle*, 15 Fed. Rep. 778. See, also, *Meyer v. Johnston*, 53 Ala. 237. Rolling-stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly recorded as a mortgage of realty, need not be recorded also as a chattel mortgage. *Farmers' Loan & Trust Co. v. St. Joseph & Denver City R. R. Co.*, 3 Dillon (U. S. C. C.), 412. A mortgage of "all the present and future-to-be-acquired property of the company, including the right of way and land occupied, and all rails and other materials used therein or procured therefor," includes the rolling-stock of the road. *Pullan v. Cincinnati & Chicago R. R. Co.*, 4 Bissell (U. S. C. C.), 35. Parties claiming an equitable lien upon rolling-stock furnished to an insolvent corporation, by virtue and to the extent of advancements made on account of the same, will not be entitled to be heard on petition, pending foreclosure proceedings upon a mortgage covering the rolling-stock and all other property of the corporation, upon which rolling-stock other liens are set up by answer, claimed to be paramount to the mortgage of the complainants. *Receivers New Jersey Mid-*

land R. R. Co. v. Wortendyke, 27 N. J. Eq. 658. In Maine a mortgage lien was held valid upon rolling-stock removed to be changed to a narrower gauge, and such lien was held not to be lost by a consolidation of the mortgagor with another company. *Hamlin v. Jerrard*, 72 Me. 62. The provision in the Illinois constitution of 1870, that the rolling-stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling-stock, if obtained before the rights of execution creditors attach. *Scott v. Clinton & Springfield R. R. Co.*, 6 Biss. (U. S. C. C.) 529. In the United States Supreme Court it is held that the chattel-mortgage statute is inapplicable to an ordinary railway mortgage. *Hammock v. Loan & Trust Co.*, 105 U. S. 77. Iron rails, spikes, ties, etc., constitute part of the realty and pass by the mortgage of the road. So cast-off articles, such as broken rails or ties, remain subject to lien of the mortgage if proper administration would require their being recast or repaired. Tools and implements in workshops, and furniture in station-houses, etc., are mere personalty and not subject to the lien of a railway mortgage. *Lehigh Coal & Navigation Co. v. Central R. R. Co. of New Jersey*, 35 N. J. Eq. 379.

treated as negotiable, although under seal,¹ and the mortgage inures to the benefit of any *bona fide* holder thereof. This is the rule even as to coupon bonds, and a *bona fide* purchaser of a bond not due is not affected by any equities which might attach against the original holder, although some of the matured interest coupons are attached thereto.² If a bond is overdue, the purchaser takes it subject to the rights of previous holders.³ If such bonds are not negotiable, they are mere choses in action, and every holder takes them subject to all equities.⁴ Of course where a bond refers to the mortgage given to secure it, it becomes subject to all the recitals and statements therein affecting it.⁵ If a bond is incomplete when issued, it does not become entitled to the privileges of negotiable paper. The uncertainty arising from their incompleteness defeats their negotiability, — as, if the amount of principal or interest is left blank, or any other essential omission exists upon the face of the bond.⁶ The law presumes that all the bonds secured by a mortgage were issued at the same time, and the fact that the bonds are numbered consecutively does not defeat this presumption.⁷ Indeed, unless the law requires that the bonds shall be numbered, it is not material that they should be numbered, and an alteration of the number does not vitiate the bond.⁸ In seeking a remedy upon these bonds, if they were issued under a statute authorizing their issue for a particular purpose, it has been held that the plaintiff should allege that the bond was issued for money borrowed for such purpose, and that it was necessary for that purpose;⁹ but it is hardly probable that the latter allegation is necessary. It need not be alleged that the bond

¹ *Virginia v. Chesapeake, &c. Canal Co.*, 32 Md. 501; *Chapin v. Vt. & Mass. R. R. Co.*, 8 Gray (Mass.), 575; *Morris Canal, &c. Co. v. Fisher*, 9 N. J. Eq. 667; *Dinsmore v. Duncan*, 57 N. Y. 573; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Carr v. Le Fevre*, 27 Penn. St. 413; *Langston v. South Carolina R. R. Co.*, 2 S. C. 248; *Craig v. Vicksburgh*, 31 Miss. 216; *Jackson v. York, &c. R. R. Co.*, 48 Me. 147.

² *National Bank of North America v. Kirby*, 108 Mass. 497; *Cromwell v. County of Sac*, 96 U. S. 51. But see *First National Bank of St. Paul v. County Comm'rs*, 14 Minn. 77, *contra*. The holder of a bond negotiable in form, with the name of the payee left blank, may fill the blank

with his own name and sue upon it. *White v. Vt. & Mass. R. R. Co.*, 21 How. (U. S.) 575.

³ *Vermilye v. Adams Exp. Co.*, 21 Wall. (U. S.) 138.

⁴ *Athenæum Life Ass. Soc. v. Pooley*, 3 DeG. & J. 294.

⁵ *Caylus v. N. Y. &c. R. R. Co.*, 10 Hun (N. Y.), 295.

⁶ *Jackson v. Vicksburgh, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 141; *Ledwick v. McKim*, 53 N. Y. 307.

⁷ *Stanton v. Alabama, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 523.

⁸ *Com. v. Emigrant Savings Bank*, 98 Mass. 12; *Birdsall v. Russell*, 29 N. Y. 220; *Spooner v. Holmes*, 102 Mass. 503.

⁹ *Miller v. N. Y. & Erie R. R. Co.*, 18 How. Pr. (N. Y.) 374.

was presented at the time and place named therein for payment, but if the payor was at the place named at the time, ready to pay the same, such circumstance would be a defence to an action upon the bond.¹ If a bond contains a provision making it convertible into the stock of the company, such right grows out of the ownership of the bond and can only be exercised by the holder thereof,² and that too within the time specified in the bond, unless the time has been regularly extended.³

SEC. 468. Trustees, Relation of, to Bondholders and Company: Powers and Duties of. — Where a mortgage of a railway is made to certain persons in trust, to secure the payment of a certain class of indebtedness, such persons occupy a merely nominal position until some of the conditions of the mortgage have been broken. When, however, the conditions of the mortgage have been broken, their duties become active, and generally, by the terms of the mortgage, they are authorized, if not required, to take possession of the property and dispose of it for the benefit of the bondholders. From the time they enter into the possession of the property, they become trustees not only for the bondholders, but also for the corporation and all subsequent mortgagees.⁴ Their primary duty, however, is to protect the interests of the bondholders to the full extent of their power and ability, and for this reason they have no authority to consent to the payment of an unsecured debt out of the property, until the bondholders have first been paid, or an ample fund for their payment has been provided.⁵ It is the duty of the trustees, upon the breach of the conditions of the mortgage, either to take possession of the property under the power in the mortgage, or to commence proceedings to foreclose it;⁶ and if they unreasonably neglect or refuse to act, any of the bondholders may commence proceedings to that end for themselves and all other bondholders, making the trustees defendants; and especially may this be done if the trustees have practised or connived at any fraud, or attempted to enter into any arrangement with the corporation or third parties which is calculated to defeat or prejudice the rights of the bondholders.⁷ If the trustees

¹ *Wallace v. McConnell*, 13 Pet. (U. S.) 136.

² *Denny v. Cleveland, &c. R. R. Co.*, 28 Ohio St. 108.

³ *Muhlenburg v. Philadelphia, &c. R. R. Co.*, 47 Penn. St. 16.

⁴ *Sturgis v. Knapp*, 31 Vt. 1; *Ashuelot R. R. Co. v. Elliott*, 57 N. H. 397.

⁵ *Duncan v. Mobile, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 542.

⁶ *Sturgis v. Knapp*, *ante*.

⁷ *Wutjen v. St. Paul, &c. R. R. Co.*, 4 Hun (N. Y.), 529.

enter into possession of the road and property, they are entitled to exercise the franchises of the company so far as is necessary to effectuate the interests of the bondholders, and until the debt is paid.¹ If they resort to foreclosure proceedings, and under the statute the absolute title to the road is vested in them, they hold the title in trust for the bondholders, and have no power to divest themselves of the title in violation of their trust.² They retain their trust until it has been fulfilled, unless they have been discharged by

¹ *Wood v. Goodwin*, 49 Me. 250.

² *Haven v. Grand Junction R. R. Co.*, 12 Allen (Mass.), 337. The fact that subsequent to the execution of the mortgage the company is consolidated with another does not affect the security, as there can be no loss of identity of the original companies by the consolidation, to defeat the rights of prior creditors, or to defeat prior liens. *Hamlin v. Jerrard*, 72 Me. 62. The holder of the bonds of a railway and telegraph company payable to bearer, with interest semi-annually, secured on the income from the sale of its land and the operation of its road and line, which have passed by consolidation to another company, is a creditor having a specific lien upon the income of the property which has gone from his debtor into the hands of the other company, and he may file a bill in equity to enforce such lien after the default in payment of the principal of such bonds and interest according to the terms thereof. *Rutten v. Union Pacific R. R. Co.*, 17 Fed. Rep. 480. One of these consolidated railroad companies, not having been able to pay the interest on its bonds, gave to the holders of the interest coupons the coupon bonds of the company for the amount of said interest. It was held that this was not a novation of the debt for the interest, and these bonds are secured by the mortgage. *Gibert v. Washington, Va., Midland, &c. R. R. Co.*, 33 Gratt. (Va.) 586. In *Hazard v. Vt. & Canada R. R. Co.*, 12 Am. & Eng. R. R. Cas. 383, the Vermont Central R. R. Co., of which the Vermont and Canada R. R. Co. was an extension, leased the whole line of road, and subsequently a contract was made that, upon default in payment of rent for four months, the Canada Company might enter upon both roads, and

take the whole income of them until the rent should be paid up, when the Central Company might resume control. The State court, in construing this lease and agreement, held that the Vermont Central Company became the owner of the whole line, including the two roads, subject to certain rights and interests in the property of its mortgage bondholders, and the rent claims of the Vermont and Canada Company, and that the Vermont and Canada Company held and owned the right to a fixed annual rent, as a first charge on the income arising from the use of said lines of road, and a right to compel the application of such income to the extinguishment of such rents, if in arrear. Subsequently the roads consolidated as the Consolidated R. R. Co. of Vermont, which issued \$7,000,000 of bonds, secured by mortgage of its roads and property to the American Loan and Trust Company, as trustee for the bondholders, to further secure which a mortgage was executed by the Canada Company, and the bonds delivered to the same trustee; \$1,000,000 of which, as a compromise, it was agreed should be accepted by the security holders of the Canada Company in place of all claim for rent, past and future. It was held that the mortgage executed by the Canada Company was a mortgage of the rent charge only, and that, as it had the right to deal with the rent, it had the right to change the security by the issue of the bonds as proposed; and as it appeared to be for the benefit of the stockholders that such compromise should be carried out, the delivery of the bonds of the Consolidated Company to the stockholders of the Vermont and Canada Company would not be restrained.

consent of the parties or by order of a court having competent authority, or have become incapacitated to act.¹ While operating the road as trustees they are liable as common carriers, and indeed may sue or be sued for any injury or default committed by them, precisely the same as the original company might be, and the property in their hands is liable to respond to the judgment.²

SEC. 469. *Removal of Trustees, Appointment of, etc.*—Where a trustee named in a mortgage becomes incapacitated to act, from any cause, or where he removes from the country,³ or dies,⁴ the trust does not descend to his heirs; but generally the statute makes provision for the filling of such vacancy, and in that case the statutory mode should be pursued,⁵ but in the absence of any statutory provision a court of equity in proper proceedings can appoint a person to fill the vacancy when necessary to preserve the trust. So, too, a court of equity may, for proper cause, remove a trustee. Thus, where a court of equity was called on, for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a non-resident trustee and appoint another in his stead, it was held that it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible, and the fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise.⁶ In a New York case⁷ pending an action to remove the trustees under a mortgage made to secure the bondholders of a railroad, the defendants cannot, by bringing an action in another department against the prosecuting bondholders, on the theory that such bondholders are improperly resisting a scheme to which a large majority of the bondholders have assented, and which is for the best interest of all, obtain an injunction perpetually staying the action for their removal. A court of equity, however, will not remove a trustee without a good and sufficient cause;⁸ but if a good cause exists, the directors of the mortgagor cannot condone it. Thus, in a

¹ Knapp v. Railroad Co., 20 Wall. (U. S.) 117.

² Daniels v. Hart, 118 Mass. 548; Palmer v. Forbes, 23 Ill. 301; Wilkinson v. Fleming, 30 Ill. 353.

³ Farmer's Loan & Trust Co. v. Hughes, 11 Hun (N. Y.), 130.

⁴ McAllister v. Plant, 54 Miss. 106.

⁵ Fletcher v. Rutland, &c. R. R. Co., 39 Vt. 633.

⁶ Ketchum v. Mobile, &c. R. R. Co., 2 Woods (U. S. C. C.), 532.

⁷ Farmer's Loan, &c. Co. v. McHenry, 9 Abb. (N. Y.) N. C. 235.

⁸ Beadlean v. Knapp, 13 Abb. (N. Y.) Pr. 335.

North Carolina case¹ the defendant was appointed by the plaintiff company trustee of a sinking fund to pay the debts of the corporation, and it was provided in the trust deed that the moneys of said fund might be invested, in the discretion of the trustee, in such securities as the president of the company or its board of directors might recommend. The trustee, without any previous direction, loaned a portion of the money to a banking firm of which he was the senior member, and which soon thereafter became insolvent. It was held that such action constituted a breach of trust, which it was not in the power of the board of directors to condone, their relation to the company being that of an agent to his principal. If the mortgage itself provides the mode in which a vacancy may be filled, as that it shall be filled from the bondholders, it has been held that the election of persons who have qualified themselves for the purpose is valid, unless fraud was intended.² Where the mortgage provides that any vacancy in the board shall be immediately filled, this shows an intention on the part of the mortgagor that the board shall always be kept full, and the remaining trustees have no authority to take possession of the property for the breach of a condition until the vacancy has been filled. But if foreclosure proceedings have been commenced, they will not abate, but they are suspended until the vacancy is properly filled.³

SEC. 470. *Foreclosure Proceedings.* — In some of the States, notably in the New England States, the statute provides what the duties of a trustee shall be in cases where the company makes default in the payment of its bonds or coupons, and in those States there can be no difficulty in ascertaining the relative rights of the bondholders and the company, or the duties of the trustees as to taking possession of the mortgaged property, or bringing proceedings to foreclose the mortgage. The mortgage, being made to trustees, they are of course the proper parties to bring proceedings to foreclose it; but where they unreasonably neglect or refuse to do so, upon default in the payment of either principal or interest, any one of the bondholders — unless the mortgage itself otherwise provides — may bring a bill in equity to foreclose it in his own name, for the benefit of himself and all other bondholders;⁴ and this seems to be the rule,

¹ North Carolina R. R. Co. v. Wilson, 81 N. C. 223.

² Richards v. Merrimack, &c. R. R. Co., 44 N. H. 127.

³ Shaw v. Norfolk, &c. R. R. Co., 5 Gray (Mass.), 162.

⁴ Webb v. Vt. Central R. R. Co., 20 Blatchf. (U. S. C. C.) 218; Wilmer v.

although the mortgage itself provides that the trustees shall foreclose it upon the request of a majority or any other number of the

Atlanta, &c. R. R. Co., 2 Woods (U. S. C. C.), 447; *March v. Eastern R. R. Co.*, 40 N. H. 548; *Mason v. York, &c. R. R. Co.*, 52 Me. 82. But the neglect or refusal of the trustees must be well established. *Campbell v. Railroad Co.*, 1 Woods (U. S. C. C.), 368; *Knapp v. Railroad Co.*, 20 Wall. (U. S.) 117; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459. As security for its bonds, a railroad company executed a mortgage to trustees, conditioned that, upon default in payment of interest for six months, all the bonds should become due and payable, and that, with the consent of the majority of the bondholders, the trustees might "proceed to collect both principal and interest of all such bonds by foreclosure and sale of said property;" which transaction was to be "a perpetual bar, in law and equity, against the title of the mortgagor." Default was made on certain of the bonds, but all were not presented, the holders having been informed by the company that they would not be paid. It was held that the trustees could not bar the mortgagor of its right to redeem within a reasonable time on payment of the interest due, and that the consent of a majority of the bondholders was an absolute essential to the right of the stockholders to so foreclose. *Chicago, &c. R. R. Co. v. Fosdick*, 106 U. S. 47. The stockholders of one road, who built and sold it to another company, accepting in payment therefor preferred stock of the latter company, are estopped, by having become stockholders of the purchasing company, from claiming to be stockholders of the former company and preferred creditors of the same. Having accepted interest on the preferred stock for three years, they are estopped to deny the power of the company to issue it. *Branch v. Jesup*, 106 U. S. 468. On a bill filed by the trustees to foreclose a consolidated mortgage, where there had been prior mortgages on different parts of the consolidated road, the net earnings of the road are to be applied primarily to the payment of the employés of the company, and of the amounts due for supplies and

materials furnished; and if, instead of making these payments, the earnings are directed either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced. *Calhoun v. St. Louis & Southeastern R. R. Co.*, 14 Fed. Rep. 9. A railroad corporation purchased, at a foreclosure, lands previously granted to another company on conditions which had not been complied with, so that the title still remained in the United States. The purchasing corporation issued certificates of indebtedness to bondholders, entitling them to shares of the land when it should be acquired by the corporation. Before it was so acquired, trespassers cut off valuable timber. It was held that the corporation was not liable in consequence to a bondholder, in the absence of evidence of the corporation having profited from the timber so cut. *Beecher v. Chicago & Northwestern R. R. Co.*, 14 Fed. Rep. 211. Where a railway corporation, through its board of directors, entered into a contract for the construction of a part of its road with certain persons, some of whom were directors of the company, and, in pursuance of that contract, executed its bond in a large sum, secured by mortgage upon its property, it was held that, although the contract be declared void, yet the corporation, being itself a party to the fraud, could not maintain a bill to set aside and cancel the mortgage as a cloud upon its title. *Lewis v. Meier*, 14 Fed. Rep. 311. Under Ark. acts of 1868 and 1869, extending State aid to railroad companies, the defendant corporation received State bonds, which it indorsed and negotiated. Upon a suit by a *bona fide* holder of such bonds, it was held that the acts created a statutory mortgage on the road and its income, revenues, and earnings; that the lien took effect from the date of the award of the loan by the railroad commissioners; that the governor's duty in issuing the bonds was ministerial; that all persons were bound to take notice of the existence

bondholders.¹ The only prerequisite is that the bondholders bringing the bill shall be *bona fide* holders of bonds, and if they are held as collateral security for a debt due them from the company, they can only have a decree for the sum actually due.² The trustees may, after proceedings have been instituted to foreclose a mortgage by individual bondholders, ask leave to come in and prosecute the suit; and unless their interests are adverse to those of the bondholders, they will generally be allowed to do so, and from that time they have entire control of the suit³ and may dismiss or prosecute it in that court, at their discretion. Where a mortgage is made to the bondholders themselves by name, *all* the bondholders must be joined as plaintiffs, and no one of them can bring a bill for himself and all others who choose to join.⁴ The other bondholders should be parties. The adequacy of the security being doubtful, each should be present to defend his own and, if necessary, attack the claims of

of the lien and of when it attached; that the lien was primarily a security for the holders of the bonds; that, as between the State and the company, the company was the principal debtor, the position of the State being like that of an accommodation indorser; that, whether the bonds were or were not valid obligations as against the State, the company, having indorsed and negotiated them, was bound upon them to *bona fide* holders, who could avail themselves of the lien. *Tompkins v. Little Rock, &c. R. R. Co.*, 15 Fed. Rep. 6.

¹ *Alexander v. Central, &c. R. R. Co.*, 3 Dill. (U. S. C. C.) 487. In a Massachusetts case — *First National Fire Ins. Co. v. Salisbury*, 130 Mass. 303 — a railroad corporation mortgaged its property and franchise to trustees, to secure the payment of certain bonds, by an instrument which provided that until default the corporation should remain in possession; that if the bonds were paid the conveyance should be void; and that, on default of the payment of the principal and interest on any bond, and on request of one half in amount of the holders of the bonds, the trustees should sell the property and apply the proceeds to the payment of the bonds. It was held that, on default in the payment of interest, the trustees had the power to foreclose and take possession of the property, though not requested so to do by one half in amount of the bondholders.

It was also held on demurrer that a bill brought by less than one sixth in amount of the holders of the bonds secured by a railroad mortgage, against the trustees thereunder, to compel them to take possession, alleged a default in the payment of interest; that the corporation had signified a purpose not to pay interest unless the holders of the bonds would take a rate less than that specified therein; that its net income was sufficient to enable it to pay interest; that it was applying the income to unsecured debts; and that there was danger that, if this course continued, the property would be inadequate security for the payment of the mortgage; and that in such suit other holders of bonds of the same issue will be allowed to come in as plaintiffs. Second-mortgage bondholders are not necessary parties, the trustees being the same under both mortgages. And it is no defence to the bill that litigation may be necessary to ascertain what property is covered by the mortgage, or that a great burden and personal liability for injuries done and debts subsequently incurred will thereby be imposed upon such trustees.

² *Jessup v. City Bank*, 14 Wis. 381.

³ *Richards v. Chesapeake, &c. R. R. Co.*, 1 Hughes (U. S. C. C.), 28.

⁴ *Railroad Co. v. Orr*, 18 Wall. (U. S.) 471.

others. If successful in the latter, his own security is enhanced. All interested, having notice, could endeavor to have as advantageous sale as possible. Even in equity, a suit on a written instrument must be brought in the name of all who are formal parties to it and retain an interest in it. The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: 1. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. 2. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party; but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. 3. Where he is not interested in the controversy between the immediate litigants, he may be a party or not, at the option of the complainant.¹ But in all other cases all should be parties plaintiff or defendant. Persons not in interest, or who are strangers to the cause, cannot be heard either by motion or petition; but in the foreclosure of railway mortgages by the trustees, the suit being really for the benefit of the bondholders, they are regarded as *quasi* parties, and an exception to the rule is made in their favor;²

¹ Williams v. Bankhead, 19 Wall (U. S.) 563.

² Anderson v. Jacksonville, &c. R. R. Co., 2 Woods (U. S. C. C.), 628. In a New York case H.'s complaint in equity alleged that in 1874 the A. railroad company issued \$1,000,000 of \$1,000 bonds, maturing in 1904, whereof he owned thirty-six, on each of which the E. railway company guaranteed to the bearer "the due and punctual payment of the interest thereon;" that since November, 1876, no interest had been paid thereon; that the A. had become insolvent and its property and franchises sold under foreclosure; that in an action by the People the E. had been dissolved for insolvency, its property being sold to trustees on foreclosure, and afterwards, in pursuance of a plan under N. Y. Laws, 1874, ch. 430, transferred to a new corporation, the N.

railroad company; that several millions of property of the E. not included in the mortgage foreclosed was sold under the mortgage foreclosed was sold under the foreclosure to H.'s prejudice (setting forth the pleadings and judgments in said suits); that said E. property not included in the mortgage foreclosed constituted a trust fund to be applied to pay the interest on the A. bonds through the guaranty; and that the foreclosure proceedings and those in the People's suit, so far as they ratified the sale of property not included in the mortgage, were fraudulent and void; and that the court rendering the judgment had no jurisdiction. The complaint prayed that all orders and decrees in those two actions be set aside so far as they affect said property, and that it be distributed among H. and others to the extent of their interest in the bonds. It was held: 1. That the debtor corporations should

but except where the officers and managers of the company are fraudulently colluding with the stockholders of the company, or are acting adversely to the interests of the corporation,¹ or where the officers of the company fraudulently refuse to attend to the interests of the corporation,² a mere stockholder cannot intervene either by cross-bill or otherwise. But in the latter case a court of equity will permit a stockholder to become a party defendant for the protection of his own interests against improper claims.

Prior mortgagees of a railroad are not necessary parties to a proceeding to foreclose a subsequent mortgage,³ because their lien upon the property cannot be defeated by any decree in such suit.⁴ But where it is sought to foreclose a junior mortgage and sell the road thereunder, and it is desirable to quiet all outstanding titles, the prior mortgagees should be made parties to the bill.⁵ Subsequent mortgagees may be made parties to a bill to foreclose a prior mortgage, and must be if it is desirable to cut off their right to redeem;⁶ but as the title stands upon the order in which conveyances were made, whether by act of the parties⁷ or by operation of law, it follows that a subsequent mortgagee, by first foreclosing his mortgage, obtains no superior rights over a prior mortgagee; and the same is also true as to judgments. Priority of lien is obtained by prior-

have been made parties, the default occurring before their insolvency. 2. That H. was not entitled to the relief, not having exhausted his legal remedy. 3. That the court had jurisdiction in both the foreclosure and the People's suit; the subject-matter had been adjudicated therein, leaving under this complaint no cause of action. *Herring v. New York, Lake Erie, &c. R. R. Co.*, 63 How. Pr. (N. Y.) 497. In another case, upon proceedings to foreclose a mortgage given to secure railroad bonds, a plan was adopted, with the assent of a majority of the bondholders, for the formation of a new corporation. Petitioners, a minority of the bondholders dissenting from the plan, charged an unjust discrimination against such minority, and that the trustee under the mortgage was acting in the interest of the majority, and that the receiver had been allowed improper compensation and expenditures, and prayed to be made parties to the foreclosure suit, for the purpose of presenting charges against the receiver

and his account. It was held that they were entitled to be made parties for this purpose. *Ex parte De Betz*, 9 Abb. (N. Y.) N. Cas. 246. Senior mortgagees will not be permitted to become parties to a suit for the foreclosure of junior mortgages to secure railroad bonds, nor will they be allowed to contest the accuracy of the judgment entered in such suit, providing for a reorganization of the road, their rights not having been affected. *Ex parte McHenry*, 9 Abb. (N. Y.) N. Cas. 256.

¹ *Forbes v. Memphis, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 323. But see *Choteau v. Allen*, 70 Mo. 290.

² *Bronson v. La Crosse, &c. R. R. Co.*, 2 Wall. (U. S.) 233.

³ *Pittsburgh, &c. R. R. Co. v. Marshall*, 85 Penn. St. 187.

⁴ *Young v. Montgomery, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 606.

⁵ *Jerome v. McCarter*, 94 U. S. 734.

⁶ *Searles v. Jacksonville, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 621.

⁷ *Jerome v. McCarter, ante*.

ity in the order of time in which the respective liens attach, and the plaintiff in a subsequent judgment, by first issuing execution and selling the property, acquires no priority or advantage over the holder of a prior judgment, where nothing remains to be done to perfect the lien under the latter.¹ The indorsers of bonds secured by a railway mortgage, whether individuals or a State, have such an interest in the subject-matter of the suit that they should be made parties to a suit to foreclose. But in the absence of any statute authorizing a suit against the State, the lack of authority to sue the State is a sufficient excuse for not making it a party to such a proceeding.²

SEC. 471. *Decrees in Foreclosure Proceedings.* — A decree of a court of equity made by the consent of the parties has no greater force than an *ex parte* decree, and is subject to revision by the court at any time before it has been executed, upon proper application to that end. Such a decree has full legal effect so long as it stands, but it is not a judicial decree in the full sense of the term, but rather a judicial confirmation of an agreement of the parties.³ But when such decree has been executed, the court has no power to change it.⁴ But if a decree entered by consent goes beyond the scope of the bill, it will only be binding as to that portion of it which is within the scope of the bill.⁵ If the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by it as if they had been made parties, unless they can show some fraud practised upon, or connived at, by the trustees themselves,⁶ especially where the bondholders were cognizant of the proceedings, appeared in the cause, and sought and obtained certain orders therein, and were heard from time to time upon questions affecting their interests.⁷ The fact that some

¹ *Bronson v. La Crosse, &c. R. R. Co.*, 2 Wall. (U. S.) 283; *Howard v. Milwaukee, &c. R. R. Co.*, 7 Biss. (U. S. C. C.) 73.

² *Davis v. Gray*, 16 Wall. (U. S.) 203; *Young v. Montgomery, &c. R. R. Co.*, *ante*. When the United States holds a lien upon a railway which is covered by a mortgage, it seems that, even though it cannot be made a party defendant, yet its equities may be quieted by proper notice of such foreclosure proceedings. *Elliott v. Van Voorst*, 3 Wall. Jr. (U. S. C. C.) 299.

³ *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 50 Vt. 500; *Union Bank v. Marin*, 3 La. An. 54.

⁴ *Wadhams v. Gay*, 73 Ill. 415.

⁵ *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, *ante*.

⁶ *Campbell v. Railroad Co.*, 1 Woods (U. S. C. C.), 368.

⁷ *Huntington v. Little Rock, &c. R. R. Co.*, 3 McCrary (U. S. C. C.), 581; *Huntington v. Little Rock, &c. R. R. Co.*, 16 Fed. Rep. 906.

of the trustees are bondholders is not of itself sufficient to render them incompetent to consent to a decree.¹ A former decree between the same parties and upon the same subject-matter is final as to all questions which were or might have been investigated in that suit, unless it appears that by some wrong act of the successful party his adversary has been deprived of his right to fully present his case.² A decree of court declaring the mortgages executed by a railway company to be the first lien on its property and franchises does not give them precedence over the prior lien of a party who had no notice of the proceedings and was not a party nor privy to the decree.³ An action for foreclosure is a proceeding in the nature of a remedy *in rem*, and not *in personam*; therefore the trustees have no right to a personal judgment, to be enforced by execution, for any deficiency in the indebtedness left after exhausting the securities and applying their proceeds. The effect of the judgment rendered in such an action is to determine the amount of the mortgage debt, so as to know how much of the security will be required to satisfy it.⁴ When a foreclosure suit has proceeded to decree *pro confesso* and an order of reference has been made, and the mortgaged premises are then sold, though the purchaser will be admitted as a party defendant, he will not be permitted to answer. He may be present at the taking of the account and avail himself of all the defences which the mortgagor could, after the decree *pro confesso* against him.⁵ A course of procedure prescribed by the mortgage, to be pursued in case of a sale by the trustee without foreclosure, is not binding upon the court in proceedings to foreclose such mortgage. Therefore, upon a foreclosure sale, the court is not bound to adopt the provisions of the mortgage as to the application of the bonds upon the bid of a purchaser, or as to the proportion in which such bonds shall be so received, or as to the manner in which their value shall be ascertained. A provision in the decree that the purchaser, after the payment of a certain specified amount in cash, could pay the balance of his bid in outstanding bonds and coupons, secured by the first mortgage, "at such percentage of the face value thereof as this court shall, at the approval of said sale, authorize and

¹ Shaw v. Railroad Co., 100 U. S. 605.

⁴ Welsh v. St. Paul, &c. R. R. Co., 25

² Brooks v. O'Hara Bros., 2 McCrary

Minn. 314.

(U. S. C. C.), 644; Woods v. Pittsburgh, &c. R. R. Co., 99 Penn. St. 101.

⁵ Hewitt v. Montclair R. R. Co., 25 N. J. Eq. 100.

³ Pittsburgh, Cincinnati, &c. R. R. Co. v. Marshall, 85 Penn. St. 187.

direct," is not erroneous, and is similar to that inserted in all railroad mortgage foreclosure sales entered in the seventh circuit.¹

SEC. 472. **Vacation of Decree.** — A decree will not be vacated except upon proceedings to that end brought by a party in interest, nor then, except for good and sufficient cause. Thus, a purchaser at a receiver's sale of a railroad, who, on the ground of the interest thereby acquired, was admitted as a defendant in a suit to foreclose a first mortgage on the property of the railroad, but with the right only to appear at the taking of the account of the amount due on the mortgage, and to be notified of the taking of the account (a decree had been made that the complainants were entitled to a sale of the mortgaged premises to pay the amount due thereon), but who, before the master's report was made, had lost all his interest in the mortgaged premises by reason of a sale thereof under foreclosure of a second mortgage, has no interest in the suit to entitle him to have the final decree therein opened, and the execution set aside, because he was not notified of the taking of the account.² So where a bill was filed in the Supreme Court of the District of Columbia, in behalf of some of many bondholders under railway mortgages, impeaching the proceeding in a cause in equity instituted by the trustees in such mortgages in the circuit court of the United States for the western district of Texas, and the title of the purchaser, under such proceedings; and where the bill showed that the circuit court obtained jurisdiction of the cause, and that the same was still pending in the court, and that the relief which was sought could be obtained on proper application, it was held that such a bill is bad on demurrer.³ Where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed.⁴ The sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors.⁵ A ruling in a foreclosure suit, denying the petition of

¹ *Farmer's Loan & Trust Co. v. Green Bay, &c. R. R. Co.*, 6 Fed. Rep. 100; 10 Biss. (U. S. C. C.) 203.

² *Ward v. Montclair R. R. Co.*, 26 N. J. Eq. 260.

³ *Fayolle v. Texas & Pacific R. R. Co.*, 3 Am. & Eng. R. R. Cas. (D. C.) 532.

⁴ *Osborn v. Michigan Air Line R. R. Co.*, 2 Flap. (U. S. C. C.) 503.

⁵ *Harpending v. Munson*, 12 Am. & Eng. R. R. Cas. (N. Y.) 408.

stockholders to be made parties in the suit brought against their corporation, is not a bar to an independent suit to set aside the decree for fraud.¹ A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpoenas upon persons without the territorial jurisdiction of the court.²

SEC. 473. Floating Debt. — The court has no power to direct the payment of any portion of the floating debt of the company out of the proceeds of the sale of the property under the mortgage without the consent of the bondholders, except in so far as the same is made a prior lien upon such property.³ Thus, the president and directors of a railroad company had contracted a floating debt to pay interest on its bonds, and for supplies and repairs for which certain persons interested in the road had become individually liable. It was held in a suit in equity brought by the trustees of the first mortgage on the railroad property to foreclose the same, that the court had no power, without the consent of the bondholders, to direct the application of the income of the road to the payment of the floating debt, although it was made to appear that it could be paid on favorable terms, and that it was equitable and probably for the interest of the bondholders that such application should be made.⁴ Nor can the purchaser be made liable for the acts of the company or trustees prior to the purchase. Thus, a railway property and franchises were bought at judicial sale by H. and others, who subsequently, under the provisions of the statute, organized a railway company. It was held that the company was not liable for the operation of the road during the time intervening between the purchase and the organization of the company, unless the possession of the company was affirmatively shown. The presumption was that H., and not the company, was in possession of the road between the date of the sale and the time of filing the certificate of organization.⁵ Where a bondholder alleged that the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which, it was claimed, was a

¹ *Tazewell County v. Farmer's Loan & Trust Co.*, 12 Fed. Rep. 752.

² *Pacific R. R. Co. v. Missouri Pacific R. R. Co.*, 8 Fed. Rep. 772.

³ *Menasha v. Milwaukee, &c. R. R. Co.*, 52 Wis. 414.

⁴ *Duncan v. Mobile, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 542; *Hale v. Burlington, &c. R. R. Co.*, 1 McCrary (U. S. C. C.), 58.

⁵ *Pittsburgh, &c. R. R. Co. v. Fierst*, 96 Penn. St. 144.

necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, it was held that it was competent for the trustee to file a bill to foreclose for the interest due; and that the plaintiff ratified the action of the trustee by filing and proving with the master more than one-third of the bonds issued.¹ In an English case railway debentures were granted, by which the "undertaking and all tolls and sums of money arising by virtue of the act, and all estate, right, and interest of the company" were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the company, and afterwards, by authority of an act of Parliament, the railway was sold and the purchase-money paid into court. It was held that the debentures, being prior in date, had priority over the judgments as against the purchase-money.² Where a railroad mortgage has been foreclosed and the road bought in for the benefit of the bondholders, most of whom united in organizing and carrying on a new corporation, and afterwards certain creditors, by judgments subsequent to the mortgage, succeeded in obtaining a decree on a bill filed to set aside the foreclosure and subject the property to payment of their judgments, it was held that the decree rendered the foreclosure invalid only as to the creditors who filed the bill; and those who took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit.³ In the division of the proceeds of the sale of railway property among the bondholders, the division is to be made *pro rata* according to the face of the bonds, and not according to the amount paid therefor. Thus, in a New York case,⁴ upon a suit to foreclose a mortgage given by a railroad company, A. produced bonds to the amount of \$810,000, which were issued to him as security for previous advances amounting to \$81,000 expended in the construction of the road. The statute under which the mortgage was made empowered the company to borrow such sums of money as might be necessary to complete and operate the road, and to issue bonds secured by mortgage to secure the payment of any debt thus contracted. At the time of the advances A. was president of the company. It was held that he was entitled to share in the distri-

¹ Credit Co. v. Arkansas Central R. R. Co., 15 Fed. Rep. 46.

² Furness v. Caterham Ry. Co., 27 Beav. (Eng. Ch.) 358.

³ Barnes v. Chicago, &c. R. R. Co., 8 Biss. (U. S. C. C.) 514.

⁴ Duncomb v. N. Y. & Housatonic R. R. Co., 84 N. Y. 190.

bution on the basis of \$810,000, and not of \$81,000, as held by the referee, and that it was immaterial that the pledge was taken for an antecedent debt.¹

SEC. 474. Decrees ordering Sale of Road in different States.—Where a mortgage is executed by a railway company upon a railroad situated in several States, it may be foreclosed in any one of them; and a decree entered in such suit ordering a sale of the entire road will be operative in the other States,² except as to such liens upon the road as have been created under the laws of such other States.³

SEC. 475. Statutory and other Liens.—Where the statute gives to certain creditors a lien upon the property of a railway company, in preference to mortgage or other incumbrances, these liens must be discharged before the mortgagee can take a clear title. It will not be advisable to refer to these statutes specifically, as they are widely different in their provisions; and the practitioner will always find it advisable to consult the statute itself, rather than a general treatise, to ascertain the exact rights of the parties so far as these statutes affect them. These statutes are personal, and exist in favor of the particular classes of indebtedness named, and of the persons to whom the indebtedness accrues, and if transferable at all, can only be transferred by the person in whose favor it accrues, and cannot be transferred by the company to a person from whom it borrows the money to discharge the lien.⁴ So, independently of any

¹ But see *Rice's Appeal*, 79 Penn. St. 168; *Jessup v. City Bank*, 14 Wis. 331; *Ackerson v. Lodi Branch R. R. Co.*, 28 N. J. Eq. 542.

² *Blackburn v. Selma, &c. R. R. Co.*, 2 Flap. (U. S. C. C.) 525; *Hurd v. Savannah, &c. R. R. Co.*, 12 S. C. 314; *Randolph v. Wilmington, &c. R. R. Co.*, 11 Phila. (Penn.) 502; *Wilmer v. Atlantic, &c. R. R. Co.*, 2 Woods (U. S. C. C.) 447; *McElrath v. Pittsburgh, &c. R. R. Co.*, 55 Penn. St. 189; *Muller v. Davis*, 94 U. S. 444.

³ *Hurd v. Savannah, &c. R. R. Co.*, ante. See also *Taylor v. Atlantic, &c. R. R. Co.*, 55 How. Pr. (N. Y.) 275; 57 id. 26; *United States, &c. Co., in re*, 55 How. Pr. (N. Y.) 286; 57 id. 16.

⁴ *Cairo, &c. R. R. Co. v. Fackney*, 78 Ill. 116. Interest on bonds secured by a statutory lien has priority over bonds

secured by mortgage. *Gibbs v. Greenville, &c. R. R. Co.*, 18 S. C. 228. See *Colt v. Barnes*, 64 Ala. 108, as to a statutory lien given to the State as indorser of the bonds. The charter of a railroad company made a certain debt a lien upon the property of the company. Afterwards the company, under a resolve, issued other bonds, secured by first mortgage, for a specified amount, greater than that of the outstanding lien debt, to be substituted for the lien debt. After the substitution was made a surplus of bonds remained in the hands of the company. Still later a second mortgage was made to secure bonds issued to meet later obligations. It was held that, as against holders of the second-mortgage bonds, the first-mortgage bonds, issued in excess of the amount of the original lien debt, but within the limit imposed by the resolution, and used as

statute, vendors of land to the company have a lien for the purchase-money due therefor, in all cases where such lien would exist against an individual, and this lien is prior to any mortgage which the com-

collateral, constituted a prior claim against the company's property, although such excess was issued after the issue of the second-mortgage bonds; and that first-mortgage bonds, used to take up the original lien debt, and afterwards coming to the hands of the company by way of purchase, and not for the purpose of being retired, also constituted a claim prior to that secured by the second-mortgage bonds. *Claffin v. South Carolina R. R. Co.*, 4 Hughes (U. S. C. C.), 12. One who, at the request of the bondholders, pays a debt of a railroad company, due for construction, cannot claim a superior equity to theirs, unless he can prove inducements and dealings of such a character as to estop them from asserting their liens as superior to his claim. *Kelly v. Green Bay & Minnesota R. R. Co.*, 10 Biss. (U. S. C. C.) 151. Where the statute gives the State a lien upon a railway, to secure certain indebtedness resulting from the issue of the bonds of the State to it, and the statute also authorizes the company to mortgage its road for a like amount to trustees to pay the State, etc., the State cannot be compelled to give up its lien until all its liabilities on account of the road embraced in the lien have been discharged. Thus, between 1854 and 1857, bonds of the State of Missouri, to the amount of \$3,000,000, were issued as a loan of credit to the Hannibal & St. Joseph R. R. Co. It was conditioned that the company should provide for the payment of principal and interest, and that the amount should constitute a first lien on the road. Missouri Act of February 20, 1865, authorized the company to issue bonds to a like amount, to convey its property to trustees to secure payment of the bonds, and authorized the trustees to pay to the State "a sum of money equal in amount to all indebtedness due or owing by said company to the State by reason of having issued her bonds and loaned the same to said company, . . . together with all interest that has, or may, at the time when such payment shall be made, have accrued and remain unpaid

by said company," and made it the duty of the governor, upon the fact of payment being certified to him, to assign to the trustees the lien of the State. It was held that the governor was not bound to assign the lien upon payment by the trustees of \$3,000,000, and of one instalment of interest then due, but that the State was entitled to receive an amount sufficient to cover outstanding coupons, although not due, as well as all other indebtedness for which the State was liable; that, although the governor might sell the road unless this was done, notwithstanding that \$3,000,000 had been paid as aforesaid, yet that the State was bound, under Missouri Act of March 26, 1881, — passed in anticipation of such payment, — to apply the amount to the payment of certain outstanding State bonds specified in the act, which application would enure to the benefit of the railroad company; that said act of 1865, empowering a release as aforesaid, was not repealed nor rendered nugatory by the Missouri Constitution of 1875, which prohibited the alienation of the State's lien upon any railroad. *Ralston v. Crittenden*, 8 McCrary (U. S. C. C.), 332. The property of the Atlantic, Mississippi, & Ohio R. R. Co. was ordered to be sold under a decree foreclosing a mortgage. A postponement of the sale was asked for, on the ground that the company's affairs were becoming more prosperous; but no tender of the debt was made, nor was it in the power of the company to make such tender. It was held that a postponement should not be granted, it being apparent that, even should the company's affairs continue equally prosperous, it would take ten years to pay the overdue interest, and that the direction that the sale be made for cash would not be modified; that, if it should appear after the sale that, by such direction, bidders were kept away, a resale, on different terms, could then be asked for. *Duncan v. Atlantic, Mississippi, & C. R. Co.*, 4 Hughes (U. S. C. C.), 125.

pany can give.¹ Whether such an equitable lien exists or not as against a mortgagee in a given case is a question which must be determined by the facts of each case; and it is for the court to say whether the acts of the vendor have been such as to postpone his lien to the mortgage.² Such mortgages have priority over the liens of subsequent judgment creditors,³ and if such judgment creditors attempt to levy upon property specifically embraced in the mortgage, they will be restrained upon application of the mortgagees;⁴ and this is so, even though the mortgage has not been recorded as required by law, if the creditor had actual notice of its existence before his lien was created.⁵ Where the trustees who have taken possession of a railway under a mortgage, and operated it, or where a receiver has done so, and a portion of the road is leased to the mortgagor, the lessor has a lien prior to the mortgage for the rent accruing under such lease.⁶

SEC. 476. Sale of the Road and Property.—Where the mortgage provides for a sale of the road and property upon a default in the payment of principal or interest, but one sale is contemplated, and the entire property may be sold upon default in the payment of interest, although no part of the principal debt is due, when the road cannot be sold in parts, without injury to the whole;⁷ and according

¹ *Anderson v. Pensacola, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 628; *Florida v. Anderson*, 91 U. S. 667.

² *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138; *Carpenter v. Black Hawk, &c. Co.*, 65 N. Y. 43; *Pierce v. Milwaukee, &c. R. R. Co.*, 24 Wis. 551.

³ *Legg v. Mathieson*, 2 Giff. 71.

⁴ *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. App. 201. Whether the debt secured by the mortgage is due or not, — *Wildy v. Mid-Hants Ry. Co.*, 18 L. T. N. s. 73.

⁵ *Butler v. Rahm*, 46 Md. 541.

⁶ *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286. See also *Sage v. Central R. R. Co.*, 99 U. S. 334; *Hale v. Frost*, 99 U. S. 389.

⁷ *Wilmer v. Atlanta, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 447. A mortgage executed by a railway company to secure its bonds provided that, in case of default for six months in the payment of the interest upon either of them, the entire amount of the debt secured "shall forthwith become due and payable," and that

the lien of the mortgage might be at once enforced. The bonds themselves declared that "in case of the non-payment of any half-yearly instalment of interest which shall have become due and been demanded, and such default shall have continued six months after demand," the principal of the bond should become due with the effect provided in the mortgage. It was held that, the mortgage being a mere security, the terms of the bonds must control in determining when the principal was payable. *Indiana & Illinois Central R. R. Co. v. Sprague*, 108 U. S. 756. In a Georgia case a mortgage of the property of a railroad company to secure the holders of its bonds, and the guarantor of their payment, provided that, upon default in the payment of the interest or principal of any bond when due, the trustees might take possession of the road and work it for the benefit of the bondholders, and that they might, at their option, in the case of default in payment, after sixty days' notice to the mortgagor, sell its property, having previously advertised said sale for

to the case last cited this is the rule as well where the trustees exercise the power of sale under the mortgage, as where they seek the

sixty days, the proceeds to be applied to the payment of the bonds. It was held that the trustees, in case of default in payment of the interest, might enter and subsequently sell, after a compliance with the requisite conditions; and that they must advertise the sale for sixty days after the sixty days required for notice had expired. *Macon, &c. R. R. Co. v. Georgia R. R. Co.*, 63 Ga. 103. Bondholders claiming the right to avoid a purchase fairly made by the president of an insolvent railroad corporation at the foreclosure sale of its property, or to treat such purchaser as a trustee for them, they having had, at the time of the sale, full knowledge of all the facts, and having then had the opportunity of taking the property off the hands of the purchaser, and having remained quiescent while such purchaser expended money of his own to make the property valuable, and the property having become enhanced in value by subsequent events, such as the general rise of railroad property and the establishment of other roads, are entitled to no relief in a court of equity. *Credit Co. v. Arkansas Central R. R. Co.*, 15 Fed. Rep. 46. In another case before the same court a railroad bondholder brought a suit in equity against a railroad corporation for an injunction and an accounting. He made the mortgage trustee a co-defendant, on the ground that he had neglected to bring the suit when requested. No service was had on the trustee, nor did he appear. It was held that, without service on, or an appearance by him, the suit could not be maintained. *Morgan v. Kansas Pacific R. R. Co.*, 15 Fed. Rep. 55. Provisions in a railroad mortgage, that, in case the trustee should sell the mortgaged property upon default of payment, the mortgaged bonds should be received, at a rate to be fixed in a certain manner, as part of the purchase-price, do not bind the court, if foreclosure proceedings are instituted, and a sale is made under its direction. *Farmer's Loan & Trust Co. v. Green Bay & Minnesota R. R. Co.*, 10 Bias. (U. S. C. C.) 203. In the mortgage of a railroad, it was covenanted and agreed by all the parties thereto that, in

case of a foreclosure sale of the mortgaged property under a decree, the trustee named in the mortgage should, on the written request of the holders of a majority of the then outstanding bonds thereby secured, purchase the property at such sale for the use and benefit of the holders of such bonds, and that the right and title thereto should vest in him, no holder to have any claim to the proceeds except his *pro rata* share thereof, as represented in a new company or corporation to be formed for their use and benefit; and that the trustee might take such lawful measures to organize a new company for their benefit upon such terms, conditions, and limitations as the holders of a majority of the bonds should in writing request or direct, and he should thereupon reconvey the premises so purchased to such new company. On default of payment, a suit was brought by the trustee against the mortgagor and subsequent mortgagees, praying for a foreclosure of the first mortgage, and for general relief. It was held: 1. That such an agreement enures equally to the benefit of such bondholders, and that each holds his interest subject to the controlling power given to the majority of them. 2. That the trustee, the *cestui*, and the trust itself, being before the court, and it appearing that the holders of a majority of the bonds had in writing requested and directed the trustee, if he became the purchaser of the property, to convey it to a new corporation, the court might authorize and direct him to bid at the sale at least the amount of the principal and interest of the first-mortgage bonds, and might provide for a complete execution of the trust. 3. That though the specific relief sought was a strict foreclosure, a decree for a sale of the property, and for the enforcement of the agreement contained in the deed, was, under the prayer for general relief, appropriate. 4. That it was not error for the court to require that if a person other than the trustee became the purchaser at the sale, he should pay at once in cash a part of his bid as earnest money. 5. That where some of the first-mortgage bond-

intervention of a court of equity under foreclosure proceedings. But if the mortgage does not provide that, upon default in the payment of interest, the principal debt shall become due, and the property can without injury be divided, then no more of it should be sold than is necessary to pay the interest matured; and a court of equity will so decree, or in a proper case it will, upon application of the company, direct that the property be leased for such a period as will secure the payment of the sum due and the interest accruing.¹ In some of the States² provision is made by statute for such contingencies, but in most of them the matter is left to the provisions of the mortgage and the discretion of the trustees and courts of equity. When a decree is obtained in foreclosure proceedings, the sale should be made by a proper legal officer; but the trustees are invested with the power to determine the question whether they will sell the road and property under the decree, as well as the time of making the sale, and they will not be compelled to make such sale by *mandamus* or other process.³ Unless the statute so provides, a sale of the property and franchises of a railway company, under a mortgage, does not destroy the corporate existence of the corporation or convey to the purchaser debts due to the company,⁴ or make him liable

holders were permitted to intervene as parties to prosecute, for the protection of their several interests, an appeal from the decree for a sale of the property, and the appeal not having been made a *supersedeas*, the decree was executed, they cannot object to orders made prior to the decree, nor assign for error any part of it which is not injurious to their interests. *Sage v. Central R. R. Co.*, 99 U. S. 334. A trustee for railroad bondholders was empowered by the mortgage to foreclose upon default, at the request of holders of the bonds to a certain amount, and to bid in the property at the request of a majority of the bondholders, and to take measures to organize a new company, upon the terms directed by such majority, and to convey the property to such company. Foreclosure was properly begun, and before sale A., a bondholder, prayed for a stay. An order was entered, to which A. assented, directing the trustee to bid up to \$450,000, "for the benefit of all the bondholders." The trustee bid in the property for \$750,000, not being requested so to do by

a majority of bondholders. In a suit brought by A. to recover the amount of his bonds it was held that the trustee had the right, and it was his duty, to make the purchase; and the order having fixed only a minimum bid at which he should allow others to purchase, he had the right to bid more. *James v. Cowing*, 82 N. Y. 449.

¹ *Bardstown, &c. R. R. Co. v. Metcalf*, 4 Met. (Ky.) 199.

² *Indiana, Kansas, Kentucky, and New York.*

³ *Farmer's Loan & Trust Co. v. Central R. R. Co.*, 4 Dill. (U. S. C. C.) 533. In Kansas provision is made as to such sales by statute. A bondholder of a railroad, who has approved a plan of reorganization, with full knowledge thereof before and afterwards, has no standing in equity to repudiate the plan, and to have the proceedings under it annulled, no fraud or imposition on him being shown. *Mathews v. Murchison*, 15 Fed. Rep. 691.

⁴ *Wright v. Milwaukee, &c. R. R. Co.*, 25 Wis. 46.

either upon the contracts or for the torts of the corporation,¹ unless the statute imposes this liability upon the purchaser as a condition precedent to its right to operate the road under a special charter.² If upon a sale of the property there is a surplus after satisfying the mortgage, it must be applied in discharging subsequent liens according to the order of their priority, or if there are no such liens, to the corporation;³ and the stockholders, according to the case last cited, are not entitled to have any part of such surplus distributed to them. Upon the sale of a railroad and its franchises, the purchaser takes the same right to operate the road which the corporation had; but as the policy of the law requires that these franchises should be exercised by a corporation, it would doubtless be necessary, where the purchase is made by an individual, that a new corporation should be formed, and in many of the States provision is made by statute for this emergency. The purchaser does not continue the old corporation, and in the absence of any statutory provision relative thereto the purchase does not invest him with corporate capacity, or pass to him the franchise to be a corporation.⁴ But in such cases a new corporation may be formed where general statutes exist authorizing their formation, or in the absence of such statutes a special charter for that purpose must be obtained. As has been before stated, the new corporation does not become liable for the debts, acts, or defaults of the old corporation, even though the mortgage or the statute provides that the stockholders of the old corporation may, upon certain conditions, become stockholders in the new one.⁵ But it may become so by a special agreement on its part to assume such liabilities.⁶ The stockholders of the old corporation

¹ *Secombe v. Milwaukee, &c. R. R. Co.*, 2 Dill. (U. S. C. C.) 469; *Hopkins v. St. Paul, &c. R. R. Co.*, 2 id. 396; *Metz v. Buffalo, &c. R. R. Co.*, 58 N. Y. 61; *Wellsborough, &c. Plank Road Co. v. Griffin*, 47 Penn. St. 417.

² *St. Louis, &c. R. R. Co. v. Miller*, 43 Ill. 199.

³ *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392.

⁴ *Atkinson v. Marietta, &c. R. R. Co.*, 15 Ohio St. 21; *Bruffett v. Gt. Western R. R. Co.*, 25 Ill. 358.

⁵ *Sullivan v. Portland, &c. R. R. Co.*, 94 U. S. 806; *Smith v. Chicago, &c. R. R. Co.*, 18 Wis. 17.

⁶ *Rutten v. Union Pacific R. R. Co.*, 17

Fed. Rep. 480. Following the decisions of the Supreme Court of Vermont, it was held by the United States Circuit Court that the mortgage executed by the Vermont & Canada R. R. Co. to secure the payment of the bonds issued by this road and the Vermont Central under the name of the Consolidated R. R. Co. of Vermont, was a mortgage of a rent charge, the V. & C. having the right to a fixed annual rent from the Central; that the V. & C., as it had the right to deal with the rent, could change the security by the issue of bonds; and that, there being apparently nothing in the transaction injurious to the interests of stockholders, the delivery of the bonds to them would not be restrained. Hazard

may become stockholders in the new one, either by the provisions of the statute, the mortgage, or by the agreement of the purchasers. But where this right is subject to a condition, the condition must be strictly complied with by the stockholder. Thus, in an action by the plaintiff against the W. railway company and a certain committee, to recover damages at law, the complaint alleged in substance that at a foreclosure sale of the railroad and franchises of the T. railroad company a committee of the holders of the bonds secured by the mortgage became the purchaser; that certain stockholders, who had questioned the validity of the sale, were accorded by the purchasers the right to take stock in the new company to be organized, on condition that the option so to do be made within thirty days; that the W. company was accordingly organized, issued stock, and was operating the road; that T. had no notice nor knowledge of the agreement until after the thirty days had expired; that, when notified, he tendered performance, and demanded his share of the new stock, which was refused. It was held that the complaint did not set forth a cause of action. If the foreclosure sale was valid, all T.'s legal rights were cut off; if invalid, his right to attack it was not affected by the agreement, unless he elected to ratify it, in which case he could not vary its terms.¹ But where the statute or contract provides that thirty days' notice shall be given of the assessment, a stockholder does not lose his right by a failure to pay within the time, where he had no notice of the assessment, and notice thereof was only given by publication, which was not brought home to him.²

v. Vt. & Canada R. R. Co., 17 Fed. Rep. 753. In a Massachusetts case the Boston, Hartford, & Erie R. R. Co. executed a mortgage to secure its bonds for \$1,000 each, with interest. The mortgage provided for foreclosure, and for the organization, after foreclosure, of a new corporation with a capital stock equal to the outstanding mortgage debt, the corporators to be the holders of the mortgage bonds, and to receive the stock of the new corporation in exchange for the surrender of their bonds at the rate of ten shares for each bond. Before foreclosure the Erie R. R. Co., for the purpose of developing business, guaranteed the payment of the interest upon a portion of these bonds, and also purchased some of the bonds at a discount, and resold them with its guar-

anty of interest indorsed upon them. In consideration of the guaranty, the B., H., & E. Co. agreed with the E. Co. that payments of interest thus made should constitute a lien on the property covered by the mortgage. It was held that the holders of these interest warrants were not entitled to demand stock of the new company in exchange for them. *Child v. New York & New England R. R. Co.*, 129 Mass. 170.

¹ *Thornton v. Wabash, R. R. Co.*, 81 N. Y. 462.

² *Vatable v. New York, &c. R. R. Co.*, 11 Abb. (N. Y.) N. C. 133. In this case a judgment, foreclosing a mortgage given to secure railroad bonds, provided for a reorganization, under which stockholders were entitled to exchange their stock for

SEC. 477. *Redemption.*—When a railway and its franchises have been sold under valid foreclosure proceedings and the sale has been confirmed, the corporation has no right to redeem the same.¹ The only remedy, if any, is by proceedings to set aside the sale, and it has been held that the corporation may institute such proceedings even though it has assigned its equity of redemption for the benefit of its creditors.² But while the trustees are in possession of the road, managing it for the bondholders, a bill to redeem may be brought;³ so, too, redemption may be made at any time before the sale has been confirmed.⁴ But in several of the States statutes exist relative to this matter, and in such cases the question as to whether a right of redemption exists is readily ascertained.

stock of the new company, upon making a specified payment. The power to fix the time within which such exchange might be made was conferred upon the parties to the "plan and arrangement." No time, however, was fixed. It was held that a stockholder was entitled to an exchange without regard to the date of his offer. In a New Jersey case, after the appointment of a receiver of an insolvent corporation, and proceedings in foreclosure, an agreement was entered into among the secured and general creditors of the corporation, whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent, payable half-yearly," and the interest was to be paid if the company should "be able to pay it by its income, after paying claims prior thereto, within the year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed. It was held that the committee had authority to consent that the bonds should be made payable at the option of the company, on or before the expiration of thirty years from the date of their issue; also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid. *Lehigh Coal & Nav. Co. v. Central R. R. Co.*, 84 N. J. Eq. 88. In a Texas case the

purchasers of a railroad at an execution sale issued a circular letter offering the old stockholders the privilege of participating in the purchase on payment, within a fixed time, of ten per cent on their full-paid stock, and a statute subsequently passed released the road from forfeiture on condition that the original stockholders were restored to all their rights to which they were entitled prior to the sale, provided they paid ten per cent upon their stock before a certain time; and later, by a resolution of the company, the original certificates of stock were replaced by new certificates on the basis of eight new for one old certificate. It was held that an original stockholder who paid the ten per cent on the amount of his stock *after* the time had expired could not compel the company to issue stock to him for the amount paid by him, there being no statute authorizing the issue of such stock. *Vanalstyne v. Houston, &c. R. R. Co.*, 56 Tex. 377.

¹ *Turner v. Indianapolis, &c. R. R. Co.*, 8 Bias. (U. S. C. C.) 380.

² *Delaware, &c. R. R. Co. v. Scranton*, 84 N. J. Eq. 429.

³ *Ashuelot R. R. Co. v. Elliott*, 57 N. H. 397.

⁴ *Howell v. Western R. R. Co.*, 94 U. S. 436; *Chicago, &c. R. R. Co. v. Foedick*, 106 U. S. 47.

CHAPTER XXX.

RECEIVERS.

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| <p>SEC. 478. When Receivers will be appointed.</p> <p>479. Appointment of Receiver on Application of Mortgage Creditors.</p> <p>480. Who will be appointed.</p> <p>481. The Status of a Receiver.</p> | <p>SEC. 482. Liability of Receiver as Common Carrier, for Negligence, etc.</p> <p>483. Judgments against a Receiver, Right to pay Claims, etc.</p> <p>484. Removal or Discharge of a Receiver.</p> <p>485. Compensation, etc., of Receiver.</p> |
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SEC. 478. When Receivers will be appointed. — Except where, as is the case in some of the States, the statute makes provision for the appointment of a receiver over a corporation in certain cases, courts of equity are extremely cautious about taking charge of its business by this summary proceeding, upon the application either of shareholders or creditors,¹ as such a proceeding necessarily results in the dissolution of the corporation, and thus accomplishes indirectly what the court has no power to do directly.² Upon the appointment of a receiver, the functions, powers, and liabilities of the corporation are suspended, and from that time it ceases to be liable for any contracts made, or acts done in the operation of the road by the receiver,³ unless the statute otherwise provides,⁴ or the possession of the receiver and the corporation or its lessee is joint.⁵ These being among the consequences incident to the appointment of a receiver, and of such nature that they directly affect the interests of the public as well as of the corporation, the courts will not interpose this remedy, except where the facts are such as to demand it, and the emergency is great.⁶ In the case of railway companies, they being corporations

¹ Neall v. Hill, 16 Cal. 145; Belmont v. Erie R. R. Co., 52 Barb. 637; Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157.

² Waterbury v. Merchants' Union Express Co., *ante*; Hanes v. Duell, 43 Barb. (N. Y.) 504; Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

³ Bell v. Indianapolis, &c. R. R. Co., 53 Ind. 57; Ohio, &c. R. R. Co. v. Davis, 23 Ind. 553.

⁴ Louisville, &c. R. R. Co. v. Cauble, 46 Ind. 277.

⁵ Railroad Co. v. Brown, 17 Wall. (U. S.) 445.

⁶ State v. Jacksonville, &c. R. R. Co., 15 Fla. 20; Railway Co. v. Jewett, 37 Ohio St. 649; Bill v. New Albany, &c.

of a *quasi* public character, and the interests of the public being directly affected by any interference with them, courts of equity will not generally put them in the hands of a receiver, except where they are insolvent, and it becomes necessary to wind them up for the benefit of its mortgage or general creditors, or where the company being able to pay its debts from its net earnings by an economical management of its business, neglects or refuses to use the surplus for that purpose.¹ It would be impossible to lay down any general rules by which to determine when a receiver will be appointed, but it must be borne in mind that the emergency must be great (independently of any statutory provision) that will justify the appointment even upon notice,² and it must be *very great* to warrant an appointment *ex parte*.³ All the circumstances are to be taken into consideration; and where one part of the trust involves duties of a public character, the court will be very reluctant to take the fund out of the hands of trustees, and will not do so except for the most cogent reasons,—such as gross fraud and imminent danger that the trust fund will be lost; and generally, if there are any coercive measures by which the trustees can be compelled to perform their duties, they will be resorted to before the extreme measure of appointing a receiver is adopted.⁴ Where the relief sought is founded upon a disputed equity, a

R. R. Co., 2 Biss. (U. S. C. C.) 390; Vt. & Canada R. R. Co. v. Vt. Central R. R. Co., 50 Vt. 500.

¹ *Stevens v. Davison*, 18 Gratt. (Va.) 819; *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112; *Milwaukee, &c. R. R. Co. v. Soutter*, 2 Wall. (U. S.) 510.

² *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, *ante*. In order to induce a court of equity to exercise this power and assume control of the property, the interests of the creditors must unmistakably require it; and where a railway company fraudulently and collusively permits its property to go into the hands of a receiver, for the purpose of keeping its property out of the hands of its creditors, the court will of its own motion discharge the receivers. *Sage v. Memphis, &c. R. R. Co.*, 18 Fed. Rep. 571. Mere insolvency is not enough. *Meyer v. Johnston*, 53 Ala. 237. Nor is the mere circumstance that a judgment has been obtained and an execution thereon returned unsatisfied. *Church v. South Side*

R. R. Co., 1 Hun (N. Y.), 636. A receiver of an extinct corporation cannot be appointed when its powers and property have been transferred to a new corporation substituted for it. *Young v. Rollins*, 85 N. C. 485.

³ *State v. Jacksonville, &c. R. R. Co.*, 15 Fla. 201; *Railway Co. v. Jewett, ante*; *Cincinnati, &c. R. R. Co. v. Sloan*, 31 Ohio St. 1. In *Turgeon v. Brady*, 24 La. An. 348. Except where insolvency is alleged, such appointments are held to be absolutely void. In Illinois, — *Hammock v. Loan & Trust Co.*, 105 U. S. 77, — such an appointment cannot be made by a judge in vacation. In Michigan, it is held that a court of equity cannot take from the directors of the company the management and control of the corporate business except in proceedings under the statute. *Cook v. Detroit, &c. R. R. Co.*, 45 Mich. 453; *People ex rel. v. Judge of St. Clair County*, 31 Mich. 456.

⁴ *Voss v. Reed*, 1 Woods (U. S. C. C.), 647.

court of equity will with great reluctance and hesitation take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railway company who would be affected similarly with the plaintiff were before the court, the court ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock.¹ The mere fact that there has been a default in the payment of interest upon its bonds secured by mortgage, and that in consequence the trustees are entitled to possession, and have demanded possession which has been refused, has been held not sufficient to warrant the appointment of a receiver. In order to justify such an exercise of power, it must also be shown that ultimate loss will result to the bondholders under the mortgage, if the property is permitted to remain in the hands of the company.² If the application is made by general creditors of the company, it must also appear that the interests of the creditors unmistakably require that a receiver should be appointed.³ Nor will it appoint a receiver if it perceives that a much greater injury would result to those interested in the road than by leaving the property in the hands then holding it, especially when it appears that the large majority of the stockholders and bondholders favor a funding plan then being negotiated.⁴ During an action to prevent an illegal consolidation of two railroad companies, the stockholders, contrary to an injunction, elected directors of the new company. It was held that this did not constitute a good ground for appointing a receiver for either of the companies; and that the appointment of a receiver cannot be lawfully made without notice, unless the delay required to give notice will result in irreparable loss.⁵ In some instances, where land damages have not been paid and possession of the land has been obtained with the knowledge of the owner, so that he cannot maintain ejectment, a receiver will be appointed and the damages paid from the earnings of the road.⁶ So where a railway company fails or refuses to complete its road, a receiver of all its property, franchises,

¹ *Overton v. Memphis, &c. R. R. Co.*, 10 Fed. Rep. 866; ³ *McCrary (U. S. C. C.)*, 436.

⁴ *Tysen v. Wabash R. R. Co.*, 8 Biss. (U. S. C. C.) 247.

² *Union Trust Co. v. St. Louis, &c. R. R. Co.*, 4 Dill. (U. S. C. C.) 114; *Chever v. R. & B. R. R. Co.*, 39 Vt. 653.

⁵ *Cleveland, Columbus, &c. R. R. Co. v. Jewett*, 37 Ohio St. 649.

⁶ *Provalt v. Chicago, &c. R. R. Co.*, 57 Mo. 256.

³ *Sage v. Memphis, &c. R. R. Co.*, 18 Fed. Rep. 571.

etc., will sometimes be appointed to complete the road.¹ Where the statute makes provision for the appointment of receivers of a railroad company in certain cases, of course no difficulty can arise in determining when such appointments should be made.

SEC. 479. Appointment of Receiver on application of Mortgage Creditors. — In order to warrant the appointment of a receiver upon the application of bondholders secured by a mortgage upon a railroad and its franchises, as we have already stated,² something more than a mere default in the payment of interest upon the bonds must be shown. It should also be made to appear that the property is insufficient to pay the debt, and that the bondholders are in danger of sustaining irreparable loss;³ or that the default in the payment of interest has been long continued;⁴ or that the company is insolvent, and its property in danger of seizure upon execution; or that the officers of the company have been guilty of gross fraud in the conduct of the affairs of the company, and have squandered or embezzled its funds;⁵ or have illegally or fraudulently executed a mortgage, upon the property to secure its stockholders, the company being insolvent;⁶ or have been guilty of an abuse of the franchises of the company;⁷ or are misapplying the funds of the company. So, too, when the trustees under a mortgage have for a considerable period after default, neglected or refused upon request of the bondholders to enter into possession of the road under the mortgage, as they have a right to do under the terms of the mortgage, the court will, in a proper case, upon application of the bondholders, appoint a receiver to execute the trust according to its terms,⁸ unless the trustees signify their willingness to act.⁹ So, too, where there has been default in the payment of interest, and the mortgage does not make any provision for the trustees' taking possession for such default, the court will, especially when the default is unreasonable, appoint a receiver for the purpose of securing the profits of the company to meet such unpaid interest.¹⁰ The court will not, in deference to

¹ *Kennedy v. St. Paul, &c. R. R. Co.*, 2 Dill. (U. S. C. C.) 448.

² *Ante*, p. 1649.

³ *Fisher v. Timans*, 12 Fla. 300; *Pul-lan v. Cincinnati, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 35; *Cincinnati, &c. R. R. Co. v. Sloan*, 31 Ohio St. 1; *Milwaukee, &c. R. R. Co. v. Soutter*, 2 Wall. (U. S.) 510.

⁴ *Williamson v. New Albany R. R. Co.*, 1 Biss. (U. S. C. C.) 198.

⁵ *Forbes v. Memphis, &c. R. R. Co.*,

2 Woods (U. S. C. C.), 323.

⁶ *Aveney v. Bles Mfg. Co.*, 27 N. J. Eq. 412.

⁷ *Rochester v. Bronson*, 41 How. Pr. (N. Y.) 78.

⁸ *Wilmer v. Atlanta, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 409.

⁹ *Jenkins v. Jenkins*, 1 Paige Ch. (N. Y.) 243.

¹⁰ *Jones on Railroad Securities*, § 468.

the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver, where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration.¹ The appointment is generally within the sound discretion of the court; but it is a power only to be exercised in strong cases. In no case of a mortgage ought a receiver to be appointed, if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest, and cost.² A receiver may be appointed in an action to foreclose a mortgage where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed.³

SEC. 480. **Who will be appointed.** — As a general rule, a party to the cause will not be appointed as receiver,⁴ and unless the parties agree upon a person to serve as such the court should appoint some person who by reason of his responsibility and business capacity and training, is fully competent to have the management of the road. It would be exceedingly unjust and improper to appoint a person as receiver of a railroad, who is not familiar with such business. A receiver being an officer of the court, and having the management of the property for it, and under its immediate direction, the court has an interest in having a competent person in that position; and an order made by it that the president and directors of the company remain in the management of the road under the order and subject to the control of the court has been held proper and to constitute them receivers.⁵ The appointment of a receiver, however erroneously made, cannot be attacked collaterally, and can only be set aside by proper proceedings brought for that purpose.⁶

SEC. 481. **The Status of a Receiver.** — A receiver, except by comity, has no power or authority as such, outside the jurisdiction of the court appointing him.⁷ But in many of the States, by comity, he is permitted to maintain actions in the courts of other States to pro-

¹ *Tysen v. Wabash R. R. Co.*, 8 Biss. (U. S. C. C.) 247. See, also, *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673.

² *Pullan v. Cincinnati & Chicago R. R. Co.*, 4 Biss. (U. S. C. C.) 35; *Rice v. St. Paul & Pacific R. R. Co.*, 24 Minn. 464.

³ *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673.

⁴ *Young v. Rollins*, 85 N. C. 485.

⁵ *Gibbes v. Greenville, &c. R. R. Co.*, 15 S. C. 304.

⁶ *Richards v. People*, 81 Ill. 551.

⁷ *Florida v. Jacksonville, &c. R. R. Co.*, 15 Fla. 201; *Booth v. Clark*, 17 How. (U. S.) 322; *Holmes v. Sherwood*, 16 Fed. Rep. 125; *Merchant's Bank v. McLeod*, 38 Ohio St. 174.

tect the interests which he has in charge;¹ and where in addition to his powers as receiver, he has acquired an interest by an assignment of the property to him or,² by reducing it to possession, his right to maintain an action therefor in his own name in another jurisdiction is conceded.³ Thus, in the case last cited, the plaintiff was appointed by a court in Arkansas receiver of the property of T., a defendant in a suit, and ordered to ship it to Memphis for sale, and to hold the proceeds subject to the order of the court. The property was shipped to Memphis and there attached by T.'s creditors. It was held that the plaintiff could maintain replevin for the property in Tennessee, although he had not then qualified as receiver or given bonds. In an Illinois case⁴ it was held that where a receiver takes possession of a barge or other property, within the jurisdiction of the court appointing him, as the property of the insolvent debtor, he becomes invested with a special property in it, like that of a sheriff on a valid levy, and he may protect this special property while it continues, by action, in the same manner as if he were the absolute owner.⁵ It may be said to be the rule in several States that the powers of a receiver are coextensive only with the jurisdiction of the court appointing him, and a foreign receiver will not be permitted, as against the claims of creditors resident in another State, to remove from another State the assets of the debtor, — it being the policy of every government to retain in its own hands the property of the debtor until all domestic claims against it have been satisfied.

¹ *National Ins. Co. v. Miller*, 33 N. J. Eq. 155.

² *Graydon v. Church*, 7 Mich. 35.

³ *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580. When he has once reduced the property to his possession, he can take it into any jurisdiction and maintain his title to it by action, whether the technical title is in him or in the corporation. In a Connecticut case, — *Pond v. Cooke*, 45 Conn. 126, — it was held that when property has once vested in an assignee or receiver by the law of the State where the property is situated, the law of another State will not divest him of his right to it, if he should take it into such State in the performance of his duty. A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency. In that case a receiver of an insolvent manufacturing corporation, appointed by a court in New Jersey where

it was located, took possession of its assets, and, for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with the funds of the estate, and sent it to that State. It was held, 1. That the iron was not open to attachment in Connecticut by a creditor residing there. 2. That a party giving a receipt for the property to the officer who attached it, and taking it into his possession, was not liable to nominal damages in a suit brought upon the receipt after a demand and refusal.

⁴ *Chicago v. Packet Co.*, 107 Ill. —.

⁵ *Cantwell v. Sewell*, 5 H. & N. 728; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 16 Wall. (U. S.) 610; *Waters v. Barton*, 1 Cold. (Tenn.) 450; *Boyle v. Tonnes*, 9 Leigh (Va.), 158; *Singerly v. Fox*, 75 Penn. St. 114.

But where a receiver has once obtained rightful possession of personal property situate within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession though he takes it, in the performance of his duty, into a foreign jurisdiction. While there it cannot be taken from his possession by creditors of the insolvent debtor who reside within such jurisdiction.¹ But in some of the States, in the case of foreign corporations, creditors in such States are given the preference over the receiver appointed in another State, when they have attached the property of such corporation in the State; and if a receiver is subsequently appointed in such State, he takes the property subject to the liens created by the attachments.² Indeed, in all cases, the receiver takes the property subject to all legal liens upon it at the time it came into his possession.³ He acquires no more or better

¹ *Pond v. Cooke*, 45 Conn. 126; *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580; *Kilmer v. Hobart*, 58 How. Pr. (N. Y.) 452.

² *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.), 353; *Dunlap v. Ins. Co.*, 12 Hun (N. Y.), 627.

³ *Bell v. Sibley*, 33 Barb. (N. Y.) 610. In an Iowa case, — *Snow v. Winslow*, 54 Iowa, 200, — a receiver of a railroad was appointed in an action to which S., who held a mechanic's lien, was not a party. He was authorized by the court to complete the railroad and issue certificates therefor. The certificates were foreclosed and the road sold, the lien-holder not being a party to this proceeding. It was held that the lien of S. was not affected. A receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment. What expenses a receiver may properly incur becomes a question sometimes of great doubt and difficulty. The fundamental idea is that he must preserve the property, and hold the same to be disposed of under the orders of the court. To that end he may, under the direction of the court, make repairs. *Blunt v. Citherow*, 6 Ves. 799; *Attorney-General v. Vigor*, 11 id. 563; *Thornhill v. Thornhill*, 14 Sim. 600. A receiver of a railroad may operate it, and pay the expenses incident thereto, because this is deemed necessary for its proper preservation. *Ellis v. B., H., & E. R. R. Co.*, 107 Mass. 1. That he may even go

further and provide additional accommodations, stock, etc., was held in *Cowdry v. Railroad Co.*, 1 Wood (U. S. C. C.), 331. In *Wallace v. Loomis*, 97 U. S. 162, it was held that the receiver might issue certificates of indebtedness for rolling-stock, and that the same might be charged upon the road as a lien paramount to subsisting liens. It was said, however, that the power should be exercised with great caution. In *Stanton v. Railroad Co.*, 2 Wood (U. S. C. C.), 506, it was held that the court might authorize the receiver to borrow money to complete an inconsiderable portion of the road, and make the sums borrowed a lien paramount to the first mortgage, it appearing to be necessary for the protection of the rights of the parties in interest. See also *Kennedy v. St. P. & P. R. R. Co.*, 2 Dill. (U. S. C. C.) 448, where certain work was authorized in making an extension which was necessary to prevent the forfeiture of an important land grant, in which all parties were interested. It is said, however, in *High on Receivers*, § 390, that "the receiver is seldom authorized to enlarge the operations of the company, or extend its line of road, his functions being usually limited to the management of the property in its existing condition." But a lien may not be displaced by an order made in a proceeding to which the lien-holder is not a party.

title thereto than the corporation had.¹ In the case of corporations formed by the concurrent action of two States, or of consolidated lines operated by the same corporation in two States, it is held that a receiver appointed by the courts of one State may exercise jurisdiction over the property in both States;² and the courts of the other State will yield all necessary aid to give and maintain the receiver's possession of the property.³ The appointment of a receiver does not abate suits pending against the corporation,⁴ nor does it prevent suits being brought against the corporation without leave of the court;⁵ but it does prevent the bringing of actions against the receiver himself, without leave of the court appointing him; and this rule applies to suits against him on a money demand or for damages, as well as to those the object of which is to recover property which he holds by order of that court. The fact that by such order he is in possession of a railroad, and engaged in the business of a common carrier thereon, does not so far take his case out of the rule that an action will lie against him for an injury caused by his negligence or that of his servants in conducting that business. If the adjustment of a demand against him involves disputed facts, the court may, in a proper case, either of its own motion or on the prayer of the parties injured, allow him to be sued in a court of law, or direct the trial of a feigned issue to settle the facts.⁶ A court of equity has no jurisdiction of a suit involving a question of unliquidated damages arising from a tort. It will not entertain a bill filed to recover damages for the death of a person through negligence of a railroad company, although the road, at the time of the injury, was in the hands of a receiver and under his entire control, and he has conveyed the road to purchasers, subject to all liabilities incurred by the receiver in operating the road.⁷ A person having a legal cause

¹ *In re Le Blanc* 4 Abb. (N. Y.) N. C. 221. His title to the property relates to the time of his appointment, without reference to the time when he became qualified to act. *Allen v. Central R. R. Co.*, 42 Iowa, 683; *Rutter v. Fallis*, 5 Sandf. (N. Y.) 610; *Steele v. Sturgis*, 5 Abb. Pr. (N. Y.) 442; *Metz v. Buffalo, &c. R. R. Co.*, 58 N. Y. 61.

² *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. (U. S.) 233.

³ *Wilmer v. Atlanta, &c. R. R. Co.*, 2 Woods U. S. C. C., 409.

⁴ *Toledo, &c. R. R. Co. v. Beggs*, 85 Ill. 80.

⁵ *Allen v. Central R. R. Co.*, 42 Iowa, 683; *Wyatt v. Ohio, &c. R. R. Co.*, 10 Brad. (Ill.) 289; *St. Joseph, &c. R. R. Co. v. Smith*, 19 Kan. 225. But see *Barton v. Barbour*, 104 U. S. 126.

⁶ *Barton v. Barbour*, 104 U. S. 126; *Kennedy v. I. C. & L. R. Co.*, 3 Fed. Rep. 97; 2 Flap. (U. S. C. C.) 704; *De Grafenreid v. Brunswick, &c. R. R. Co.*, 57 Ga. 22.

⁷ *Brown v. Wabash R. R. Co.*, 96 Ill. 297.

of action sounding merely in tort against a receiver appointed by the court of chancery has a right to pursue his redress by an action at law. Such action cannot be brought without the permission of the chancellor, but such permission cannot be refused unless the claim preferred be manifestly unfounded and vexatious. The power of the chancellor in this respect was considered in a New Jersey case, and as the right of the chancellor to sanction the bringing of the action conferred a *scintilla* of jurisdiction over the case, and the parties proceeded to try the cause before the vice-chancellor, it was held that the court of appeals could lawfully exercise its jurisdiction by way of review, and, the decree being reversed, the complainant's damages could be ascertained and adjudged to him on the appeal.¹ The United States courts hold that the rule requiring the leave of the court to bring an action against a receiver is not overcome by a State statute abrogating the rule, or providing that certain classes of actions may be brought without such consent.² An execution cannot be levied upon property in the hands of a receiver. If a judgment creditor claims that he has a lien upon the property superior to the mortgage or other creditors whom the receiver represents, his remedy is by applying to the court which appointed the receiver to have the property discharged from the custody of the receiver,³ and any interference with the property which is wilful,⁴ or unwarranted,⁵ will be punished by the court as a contempt. The reason for this is, that the receiver is the agent of the court, and his possession is the possession of the court; therefore any interference therewith is an interference with property in the custody of the court.

Property in the hands of a receiver is *in custodia legis*. His possession is the possession of the court appointing him. No suit can be brought against him to disturb his possession, or to charge him

¹ *Palys v. Jewett, Receiver*, 32 N. J. Eq. 302. The defendant railroad company was in possession and management of receivers appointed by the court of chancery. The petitions to recover for the injuries were properly brought to that court. *Merrill v. Central Vt. R. R. Co.*, 54 Vt. 200. *Contra, Wabash R. R. Co. v. Brown*, 5 Brad. (Ill.) 590.

² *Hale v. Duncan* (U. S. C. C.) 7 Cent. L. J. 146.

³ *Skinner v. Maxwell*, 68 N. C. 400; *Coe v. Columbus, &c. R. R. Co.*, 10 Ohio

St. 372; *Robinson v. Atlantic, &c. R. R. Co.*, 66 Penn. St. 160.

⁴ *Secor v. Toledo, &c. R. R. Co.*, 7 Biss. (U. S. C. C.) 513; *King v. Ohio, &c. R. R. Co.*, 7 Biss. (U. S. C. C.) 529; *Robinson v. Atlantic, &c. R. R. Co.*, *ante*. Suing a receiver without leave of the courts is punishable as for a contempt. *Thompson v. Scott*, 4 Dill. (U. S. C. C.) 508; *Gest v. New Orleans, &c. R. R. Co.*, 30 La. An. 28.

⁵ *Richards v. People*, 81 Ill. 551.

with liability for an act done in the performance of his duties as such receiver without the consent of such court. Any one instituting such a suit without leave may be enjoined or attached for contempt. The proper proceeding is to apply to the court appointing the receiver, by petition, setting forth therein the grounds of complaint. Thereupon the court will direct a trial by a jury, reference to a master, or such other mode of proceeding as in its discretion it may deem best. The right of trial by jury in such a proceeding against a receiver, on a common-law cause of action, is not an absolute right, but the granting or withholding thereof lies within the sound discretion of the court. Such a proceeding is not a "suit at law" within the provision of the Constitution guaranteeing the right of trial by jury. Thus, in a case before the United States Circuit Court for the Southern District of Ohio, upon application of bondholders of the Indianapolis, Cincinnati, & La Fayette Railroad, in a suit to foreclose their security, a receiver was appointed to operate the road. During such operation a train ran over a Mrs. Cork. A petition was filed in the foreclosure proceeding by her husband, as administrator, to recover damages for her death. It was held that the petitioner was not entitled to a trial by a jury.¹ But in some of the States it is denied that the receiver is the agent of the court appointing him,² and it is held that actions may be brought against him without leave of the court appointing him; but there can be no question that the rule is generally otherwise, and that reason and authority sustain it.³

¹ *Kennedy v. Indianapolis, &c. R. R. Co.*, 3 Fed. Rep. —.

² *Iowa*, *Allin v. Central R. R. Co.*, 42 Iowa, 683; *Wisconsin*, *Kinney v. Crocker*, 18 Wis. 74; *Illinois*, *Safford v. People*, 85 Ill. 558.

³ *Thompson v. Scott*, *ante*. In *Kennedy v. Railroad Co.* (U. S. C. C.), Int. Rev. Rec., Dec. 6, 1880, 3 Fed. Rep., it was held that an action against the receiver of a railroad company, for damages for personal injury, cannot be sustained without leave of the court by which he is appointed, but that on application he will be permitted to go before a master, or sue in a court of law, and that he has no absolute right to a jury trial if the Court of Chancery choose to retain jurisdiction. *BAXTER, J.*, says: "Such has been the uniform holding of the courts until recently, since which modifications of the

rule have been attempted by a few exceptional adjudications, and by legislative enactments in some of the States. A statute of the kind exists in Ohio. But this statute cannot control the action of this court. *Jones on Railroad Securities*, § 503; 7 Cent. L. J. 146; and *Thompson v. Scott*, 4 Dill. (U. S. C. C.) 508. Nor can we yield to the modification of the rule adopted by some of the State courts. These decisions have been ably reviewed by *LOVE, J.*, in the case of *Thompson v. Scott*, *ante*, and his refutation of them maintained by a cogency of reasons that ought, we think, to forever foreclose all further discussion of the question. *MR. HIGH*, who advocates (in an article published in the "Southern Law Review") the new doctrine, admits that 'the weight of authority is adverse to the exercise of any right of action against a receiver by any

This general rule that a receiver cannot be sued without leave of the court by which he was appointed applies to suits brought against him to recover a money demand or damages, as well as to those the object of which is to take from his possession property which he is holding by order of the court. The fact that a receiver is in possession of a railroad, and is by the order of court engaged in the business of a common carrier thereon, does not take his case out of the rule that he is only answerable to the court by which he was appointed and cannot be sued without its leave. No suit can be maintained against the receiver of a railroad who is by order of court conducting the business of a common carrier thereon, for injury to persons or property caused by his negligence or that of his servants, without leave of the court by which he was appointed. The trial by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury. If the adjustment of a demand against the receiver involves any dispute in regard to the facts on which his liability depends, or in regard to the amount of the damages sustained, a court of equity, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts. A court of equity may in its discretion, in view both of the public and private interests involved, authorize its receiver of the road and other property of a railroad company to keep the same in repair and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested therein. When the court of one State has a railroad or other property in its possession for administration as trust assets and has appointed a receiver to aid it in the performance of its duty, by carrying on the business to which the property is adapted until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property.¹

court other than that from which he derives his appointment, and to which he is amenable."

¹ *Barton v. Barbour*, 104 U. S., 126. In this case Wood, J., said: "The plaintiff in error concedes it to be a general rule,

A receiver has all the rights which the corporation itself had, and is entitled to pursue the same legal remedies ; but as a rule, he can-

that before suit is brought against a receiver, leave should be obtained from the court by which he was appointed, and contends that the only consequences resulting from the prosecution of such a suit without leave, is that the plaintiff may be restrained by injunction or attached as for a contempt. He insists however, first, that the general rule requiring leave applies only to cases where the purpose of the suit is to take from the receiver property which is actually in his possession, placed there by order of the court. We conceive that the rule is not so limited. The evident purpose of a suitor, who brings his action against a receiver without leave, is to obtain some advantage over the other claimants upon the assets in the receiver's hands. His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. *Hall v. Smith*, 2 Bing. 156 ; *Camp v. Barney*, 4 Hun (N. Y.), 373 ; *Commonwealth v. Runt*, 26 Penn. 235 ; *Thompson v. Scott*, 4 Dill. (U. S. C. C.) 588. If he has a right in a distinct suit to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it without leave. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust of any attempt to enforce satisfaction of his judgment would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver. A suit therefore brought without leave to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is and effect of which may be, to take the property of the trust from the receiver's hands and apply it to the payment of the plain-

tiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think therefore that it is immaterial whether the suit is brought against the receiver to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained. And it has been so held in effect by this court. In the case of *Wiswall v. Sanipson*, 14 How. (U. S.) 52, this court said : ' It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and the sale therefore in such a case should be upheld. But conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the result of the litigation and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree and the litigation become fruitless.' So in *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332, Lord ROMILLY, Master of the Rolls, said that it is an idle distinction that the rule forbidding any interference with property in the course of administration in the Court of Chancery only applies to property actually in the hands of the receiver, and declared that it applied to debts, rents, and tolls which the receiver was appointed to receive. It is next asserted by plaintiff in error that the fact that the receiver in this case is in possession of and is conducting the business of a railroad as a common carrier, takes his case out of the rule that he is only answerable to the court by which he is appointed, and cannot be sued without its leave. His con-

not sue without first obtaining leave from the court appointing him.¹ If two or more receivers are appointed of the same property

tention is that parties who deal with such a receiver either as freighters or passengers upon his railroad, may for any injury suffered either in person or property, sue the receiver without leave of the court by which he was appointed. We do not perceive how the fact that the receiver under the orders of the court is doing the business usually done by a common carrier makes his case any exception to the rule under consideration. It was said by this court in *Cowdrey v. Galveston, etc., R. R. Co.*, 98 U. S. 352, that 'the allowance for goods lost in transportation and for damages done to property whilst the road was in the hands of the receiver was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind as well as the expenses incurred in their behalf were paid.' This puts claims against the receiver in his capacity as a common carrier on the same footing precisely as the salaries of his subordinates or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured in person or property by the negligence of the servants of the receiver, can without leave sue him to recover his damages, then every conductor, engineer, brakeman or track-hand can also sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property in the hands of a court of equity to be controlled by other courts, at the instance of impatient suitors, without regard to the equities of other claimants and to permit the trust property to be wasted in the costs of unnecessary litigation. Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the

claim involves any dispute in regard to the alleged negligence of the receiver or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law or direct the trial of a feigned issue to settle the contested facts. The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while travelling on the railroad, managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way. We therefore think that the demand of the plaintiff in error is not of such a nature that it may be prosecuted by suit without leave of the court. The plaintiff lastly contends that want of leave to bring the suit does not take away the jurisdiction of the court in which it was brought to hear and determine it, but only subjects the plaintiff to liability to be attached for contempt or to be enjoined from its further prosecution. In other words, he says that leave to prosecute the suit is not a jurisdictional fact, and that therefore the plea to the jurisdiction should not have been sustained. Our decision upon this question will be limited to the facts of this case, which are that the receiver was appointed by a court of the State of Virginia, and the property in course of administration was in that State; the suit was brought in a court of the District of Columbia, a foreign jurisdiction, and the cause of action was an injury received by plaintiff in the State of Virginia, by reason of the negligence of the defendant while carrying on the business of a railroad, under the orders of the court by which he was appointed. No leave was obtained to bring the suit and it does not appear that any application was made, either to the receiver or to the court by which he was appointed, to allow and pay

¹ *Screeven v. Clark*, 48 Ga. 41; *Parker v. Browning*, 8 Paige (N. Y.), 388.

by different courts, it is the generally accepted doctrine that the court first taking jurisdiction is entitled to retain jurisdiction until

the demand of the plaintiff in error. Upon these facts we are of opinion that the Supreme Court of the District of Columbia had no jurisdiction to entertain a suit. This point has been substantially settled by this court in the case of *Peale v. Phipps*, 14 How. (U. S.) 368. In that case it appeared that under a law of the State of Mississippi, by the decree of the Circuit Court of Adams county in that State, the charter of the Agricultural Bank at Natchez was declared forfeited and the corporation dissolved, and Peale, the plaintiff in error, appointed trustee and assignee of its assets, and was the sole legal representative of the corporation; that he became legally liable to the creditors of the bank to the extent of the assets, and that he had assets in his possession sufficient to pay all the debts of the corporation. The defendants in error claimed that there was due them from the bank a large sum of money on account of mesne profits, etc., of certain real estate in Natchez, from which they had been unlawfully expelled by the bank, and the possession of which they had recovered from the bank in an action of ejectment. The defendants in error presented their claim to Peale, the receiver, for allowance as a valid claim against the bank, who refused to admit or allow it, or any part of it. Thereupon the defendant in error brought suit against Peale in the United States Circuit Court for the Eastern District of Louisiana, to recover said mesne profits, and effected service upon him in that district. Peale, among other defences, filed an exception, in which he denied the jurisdiction of the court. This was overruled and judgment was rendered against him for \$20,058, to be satisfied out of the assets of the bank in the hands of Peale as trustee. The case having been brought on error to this court, the judgment was reversed. The court, Chief-Justice Taney delivering its opinion, said: 'As we think this exception [the one just mentioned] decisive against the jurisdiction of the Circuit Court of Louisiana, it is unnecessary to set out the other exceptions. We see no ground upon which the jurisdiction of the court can

be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county, and subject to its order, and was not authorized to dispose of any assets or pay any debts due from the bank, except by order of the court. He had given bond for the performance of his duty, and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it and wrest it from the hands of its agent and thereby put it out of his power to perform his duty.' And the court declared that the facts stated in the petition showed 'that the Circuit Court of Louisiana had no jurisdiction' of the case. That case differs from the one now under consideration only in this, that it was a suit to recover a judgment against the trustee and receiver upon a demand due from the bank before his appointment, while the present case seeks to establish a demand against the receiver for a claim which, according to the decision of this court (*Cowdrey v. Galveston, etc. R. R. Co.*, *supra*), forms a part of the charges and expenses of executing that trust. Such charges are specially subject to the control and allowance of the court which is administering the trust property. We think therefore that the case just cited is decisive of this. The argument is much pressed that by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or against the receiver will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. To support this view the following cases are cited: *Palys v. Jewett*, 32 N. J. Eq. 302; *Kinney v. Crocker*, 18 Wis. 80; *Allen v. Central R. R. of Iowa*, 42 Iowa, 688. But those who use this argu-

the litigation is ended,¹ and to take and retain the possession of the property, without interference from other courts, unless a receiver

ment lose sight of the fundamental principle that the right of trial by jury considered as an absolute right does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. Thus, upon a bill filed for an injunction to restrain the infringement of

letters-patent, and for an account of profits for past infringement, it is now the constant practice of courts of equity to try without a jury issues of fact relating to the title of the patent, involving questions of the novelty, utility, prior public use, abandonment and assignment of the invention patented. The jurisdiction of a court of equity to try such issues according to its own course of practice is too

¹ *Sedgwick v. Meach*, 6 Blatchf. (U. S. C. C.) 156; *Bell v. New Albany, &c. R. R. Co.*, 2 Biss. (U. S. C. C.) 390; *Union Trust Co. v. Rockford, &c. R. R. Co.*, 6 Biss. (U. S. C. C.) 197; *Memphis v. Dean*, 8 Wall. (U. S.) 64. If a receiver appointed by another court, on a bill filed while the controversy is pending, takes prior possession of the *res*, his possession is wrongful and should give way to the prior jurisdiction of this court. *Gaylor v. Fort Wayne, &c. R. R. Co.*, 6 Biss. (U. S. C. C.) 286; *Union Trust Co. v. Rockford, &c. R. R. Co.*, 6 Biss. (U. S. C. C.) 197. Where a receiver who has been appointed by a State court in the interest of the creditors of a construction company proceeds with the work of construction by entering into contracts, etc., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a Federal court, especially after the State court has proceeded, without objection, to adjudicate upon the rights of the parties. *Buell v. Cincinnati, &c. Construction Co.*, 9 Fed. Rep. 351. Where a State court, on a bill of like character with one pending in the United States court, appoints a receiver inadvertently, and without knowledge of the facts in the Federal court, and the circumstances indicate collusion in the State court, the appellate court will not interfere with the judge of the State court in revoking the order appointing his receiver, and turning over the property to the receiver of the United States court. *May v. Printup*, 59 Ga. 128. An order was granted by a justice of the Supreme Court at chambers, in

the first district, appointing a receiver of the property, franchise, and effects of the defendant. It did not appear that the order had ever been entered in the second department. It was held that, being a chamber order, no appeal from it would lie until it had been so entered. *Clinch v. South Side R. R. Co.*, 2 Hun (N. Y.), 154. Where a conflicting question of jurisdiction arose between the Superior Courts of two counties in the matter of the appointment of a receiver for the defendant corporation, who, pending the controversy, was duly elected president thereof, it was held that the Supreme Court, without expressing an opinion, should affirm the order below appealed from, as it will not decide a question of great importance except where it is necessary to protect a substantial right. *Comm'rs of Craven County v. Atlantic, &c. R. R. Co.*, 77 N. C. 297. Where a State court, on a petition under the Indiana statutes to dissolve a corporation, has taken jurisdiction and decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States court. *Conkling v. Butler*, 4 Biss. (U. S. C. C.) 22. But the fact that the property is being administered upon in proceedings taken in a State court, and that the plaintiff might apply to that court for relief, is no bar to the institution of proceedings in the Circuit Court of the United States. *Griswold v. Central Vermont R. R. Co.*, 9 Fed. Rep. 797.

subsequently appointed has first taken possession of the property, in which case it has been held that priority of possession gives the

well settled to be shaken. *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788; *Cawood Patent*, 94 U. S. 695; *Marsh v. Seymour*, 97 id. 348. So in cases of bankruptcy many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but as belonging to the bankruptcy proceedings they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion. True, if one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrong-doer, in an action at law for its recovery. Very analogous to the case of an assignee in bankruptcy, is that of a receiver of an insolvent railroad company or other corporation. Claims against the company must be presented in due course, as the court having charge of the case may direct. But if the receiver by mistake or wrongfully takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting *ultra vires*. *Parker v. Browning*, 8 Paige (N. Y.), 338; *Paige v. Smith*, 99 Mass. 395; *Hills v. Parker*, 111 id. 508. So far the case seems plain. But if claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labor performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress. The new and changed condition of things which is presented by the insolvency of such an institution as a railroad company, has rendered necessary the exercise of large and modified forms of control over its

property by the courts charged with the settlement of its affairs and the disposition of its assets. Two very different courses of proceeding are presented for adoption. One is the old method, usually applied to banking, insurance, and manufacturing corporations, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will fetch at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all parties having any title to or claim upon the *corpus* of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim. It is evident that the first method would often be highly injurious and would result in a total sacrifice of the property. Besides, the cessation of business for a day would be a public injury. A railroad is authorized to be constructed more for the public good to be subserved, than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, which neither the company nor any creditor or mortgagee can interfere with. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is therefore a matter of public right by which the courts when they take possession of the property authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not receive detriment by the non-user of the franchises. And in most cases the creditors cannot complain, because their

better right to its control.¹ The court appointing a receiver may take cognizance of questions involving the receiver's liability, or may permit them to be tried in a court of law, unless the jurisdiction of the court is assailed.² In Vermont it has been held that the court has power to restrain parties within its jurisdiction from prosecuting suits in foreign courts which interfere with the receiver's possession and control of the property.³ If a receiver appointed by one court is in possession of the property, he is not amenable to suit in another court in respect thereto; and if the property has passed beyond his control, he would not in any event be a necessary party in a proceeding to adjudge a lien on such property still subsisting, notwithstanding the proceedings in the court wherein he was appointed

interest as well as that of the public is promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for non-user. As a choice, then, of least evil, if not of the most positive good (but generally of the latter also), it has come to be settled law that a court of equity may and in most cases ought to authorize its receiver of railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of the court to do this was expressly recognized in the case of *Wallace v. Loomis*, 97 U. S. 146. But here arises a dilemma. If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself whilst carrying on the business of the railroad was, it would become impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities. It has therefore been found necessary, and has become a common practice for a court of equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suits unless leave is first obtained of the court by which he was appointed. If the court below had entertained jurisdiction of this suit it would have been an attempt on its part to adjust charges and expenses incident to the administration by the court of another jurisdiction of trust property in its possession, and to enforce the payment of such charges and expenses out of the

trust property without the leave of the court which was administering it, and without consideration of the rights and equities of other claimants to the fund. It would have been a usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distribute the trust assets to creditors equitably and according to their respective priorities. We therefore declare it as our opinion that when the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed, and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property. It follows from these views that the judgment of the Supreme Court of the District of Columbia must be affirmed." MILLER, J., dissented.

¹ BRADLEY, J., in *Wilmer v. Atlanta, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 409.

² *Kain v. Jewett*, 26 N. J. Eq. 474.

³ *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 46 Vt. 792.

receiver.¹ In a Kansas case,² a county treasurer filed his petition in the district court against a railroad company, and a receiver of the company appointed by the circuit court of the United States, to recover the taxes levied upon the company for the year 1874. The petition alleged the appointment of the receiver and his possession and control of the road. Without, so far as the record disclosed, the issue or service of any process, the company and receiver filed a joint answer, in which they admitted that a portion of the taxes were properly chargeable against the company, and consented that judgment might be rendered against them in the action for that amount; and also alleged the appointment of the receiver by the United States Circuit Court, that he was not amenable to the process of the District Court, and prayed that as to him the suit might be dismissed. It was held that the District Court had jurisdiction, and properly rendered judgment against the receiver. The jurisdiction of the court first attaching may be said to be unquestionable. Chief Justice MARSHALL announced the rule in an early case,³ as follows: "Of two courts having concurrent jurisdiction of any matters, the one whose jurisdiction first attaches acquires exclusive control of all controversies respecting it involving substantially the same interests;" and this rule is almost universally followed.⁴ It has been held that, when

¹ *Massachusetts Mutual Life Insurance Co. v. Chicago, &c. R. R. Co.*, 13 Fed. Rep. 357.

² *St. Joseph, &c. R. R. Co. v. Smith*, 19 Kan. 225.

³ *Smith v. McIver*, 9 Wheat. (U. S.) 532.

⁴ *Mallett v. Dexter*, 1 Curt. (U. S. C. C.) 178; *The Robert Fulton*, 1 Paine (U. S. C. C.), 621; *Ex parte Robinson*, 6 McLean (U. S. C. C.), 355; *Board of F. Missions v. McMasters*, 4 Am. Law Rev. 526; *Ex parte Sifford*, 5 id. 659; *Parsons v. Lyman*, 5 Blatchf. (U. S. C. C.) 170; *United States v. Wells*, 20 Am. Law Rev. 424; *Crane v. McCoy*, 1 Bond (U. S. C. C.), 422; *Blake v. Railroad*, 6 N. B. R. 331; *Levi v. Life Ins. Co.*, 1 Fed. Rep. 206; *Hamilton v. Chouteau*, 6 id. 339; *Ins. Co. v. University of Chicago*, 6 id. 443; *Walker v. Flint*, 7 id. 435; *Wire Co. v. Wheeler*, 11 id. 206; *Ins. Co. v. Railroad*, 13 id. 357; *The J. W. French*, 6 id. 916; *Stout v. Lye*, 103 U. S. 66. In a case where the Supreme Court of

New Hampshire decreed the foreclosure of a deed of trust and mortgage of a railroad, and the property was actually sold, it was held that the Circuit Court of the United States could not entertain a bill to enforce the operation of the road by trustees for the benefit of its stockholders, although the bill was filed before the sale, and the sale when made was declared to be subject to the result of the suit in the Circuit Court. CLARK, D. J., said: "The possession of a receiver is the possession of the court appointing him, and cannot be divested by a court of co-ordinate jurisdiction." *Bruce v. Manchester, &c. R. R. Co.*, 19 Fed. Rep. —; *Taylor v. Carryl*, 20 How. (U. S.) 583; *Hagan v. Lucas*, 10 Pet. (U. S.) 100; *Freeman v. Howe*, 24 How. (U. S.) 450; *Buck v. Colbath*, 3 Wall. (U. S.) 834; *Walker v. Flint*, 7 Fed. Rep. 435. In *Andrews v. Smith*, 5 Fed. Rep. —, in a suit by the first-mortgage bondholders of the Vermont Central Railroad against the mortgage trustees, for holding the trustees ac-

a receiver of a railroad company has been appointed by a United States court, another corporation can acquire no right of way over the line by proceedings for its condemnation;¹ but it is not believed that this doctrine can be sustained either in reason or upon authority. The right of eminent domain is a public right, existing for the benefit of the public, and it cannot be legally suspended by the action of any court, State or national, in any collateral proceedings, or because the land is in the custody of the court. The receiver and the corporation being made parties to such proceedings, there can be no doubt that a good title under such proceedings may be obtained.

SEC. 482. Liability of Receiver as Common Carrier, for Negligence, etc.—There seems to be no good reason why a receiver, operating a railway as the agent of the court appointing him, and deriving no profit or advantage to himself therefrom, should be liable for the

countable for moneys alleged to have been taken by them from the trust funds in their hands in violation of their trust, the defendants pleaded that during the period of the accounting called for they had been in possession of the railroad as receivers or officers of the Court of Chancery of Franklin County, Vermont, and as such receivers, had already rendered an account to the Court of Chancery for the sums claimed in the suit, and so they could not be held chargeable therefor in any proceeding for that purpose in this court; or that if they were otherwise so chargeable, yet as the same subject-matter was previously before the State court for adjudication, this court should dismiss the plaintiffs' bill, out of comity toward the State court. The defendants also contended that if they had ceased to be receivers of the State court prior to the origin of the demand in suit, yet no order for discharging them as receivers had ever been entered in the State court, and that this court should still regard them as official receivers of the State court. It was held by WHEELER, D. J., that the receivership formerly existing in the State court had practically ceased prior to the period covered by the accounting claimed in this case, and that the State court had so determined, and that as the parties themselves had brought the receivership to a close by their own

acts, no formal entry in court of such discharge was necessary, and that as the parties to the proceeding in the State court were not the same as the parties in this case, the pendency of such proceedings would be no bar to this suit. Also, that the rule of comity toward the State court could not operate to deprive this court of its own rightful jurisdiction. *Stanton v. Embrey*, 93 U. S. 548; *Cook v. Burnley*, 11 Wall. (U. S.) 668; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1; *Harris v. Dennie*, 3 Pet. (U. S.) 292; *Hagan v. Lucas*, 10 id. 400; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Anonymous*, 6 Ves. 287; *Angel v. Smith*, 9 id. 335; *Booth v. Clark*, 17 How. (U. S.) 322; *Peck v. Jenness*, 7 id. 612; *Vermont & Canada R. R. Co. v. Vermont Cent. R. R. Co.*, 50 Vt. 500; *Mallett v. Dexter*, 1 Curt. (U. S. C. C.) 178; *Erwin v. Lowery*, 7 How. (U. S.) 172; *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Union Bank v. Jolly*, 18 How. (U. S.) 503; *Shelby v. Bacon*, 10 id. 56; *Green v. Creighton*, 23 id. 90; *Davis v. Duke of Marlborough*, 2 Swanst. 113; *Railroad Co. v. Soutter*, 2 Wall. (U. S.) 510; *Windsor v. McVeigh*, 93 U. S. 274; *Payne v. Hook*, 7 Wall. (U. S.) 425.

¹ *Western Union Tel. Co. v. Atlantic, &c. Tel. Co.*, 7 Biss. (U. S. C. C.) 367.

negligence of his employes therein, in the same manner and to the same extent that the corporation would be if it was operating the road, and the better rule seems to be that they are only liable in their official capacity for such injuries;¹ and according to the case first cited in the last note, where an action is brought against him in such an action individually, it will be enjoined upon a bill brought for that purpose.² But for his own personal wrongs or negligence he is personally liable.³

At law, a receiver operating a railway is treated as a common carrier, and is liable as such, but he may invoke the aid of the court of chancery appointing him to protect him from actions of this nature,⁴ or he may waive the aid of the court, in which case he is answerable in the same manner as the corporation would be.⁵ But in New York, a receiver is treated, and, as we believe, properly, as acting in a capacity analogous to that of a public officer, and therefore is only responsible for his own wrongs.⁶ But where he is acting in a *dual* capacity, namely, as a receiver *and trustee* of the road, he is liable as a common carrier.⁷ There are cases in which a contrary doctrine is held,⁸ but an examination of them will disclose that the question was not carefully considered, and that the doctrine applicable was misconceived.

SEC. 483. Judgments against a Receiver, Right to pay Claims, etc. — A judgment against a receiver appointed under foreclosure proceedings cannot take precedence of the mortgage debt, except where it is for a debt constituting a part of the operating expenses of the road. Thus, pending the foreclosure of a railway mortgage, the plaintiff commenced an action against the receiver in charge of the road to recover for personal injuries sustained through the alleged negligence of the receiver's employes between the date of the foreclosure

¹ *Camp v. Barney*, 4 Hun (N. Y.), 373; *Kain v. Smith*, 80 N. Y. 458. In this case, however, where the receiver appointed by the courts of Vermont, leased a line of railroad in New York, the court held that as the court appointing him had no control over the leased road, he was liable individually for its management. *Gibbs v. Greenville, &c. R. R. Co.*, 15 S. C. 518; *Rogers v. Mobile, &c. R. R. Co.*, 12 Am. & Eng. R. R. Cas. (Tenn.) 442; *Cardat v. Barney*, 63 N. Y. 281.

² But see *Klein v. Jewett*, 26 N. J. Eq. 474, where the receiver is held personally liable.

³ *Hopkins v. Connell*, 2 Tenn. Ch. 323.

⁴ *Camp v. Barney*, *ante*. In *Blumenthal v. Brainerd*, 38 Vt. 402, it was held that a plea that the defendant was acting as receiver, is no defence at law. *Sprague v. Smith*, 29 Vt. 421.

⁵ *Newell v. Smith*, 49 Vt. 255; *Cowdrey v. Galveston, &c. R. R. Co.*, 93 U. S. 352.

⁶ *Rogers v. Wheeler*, 43 N. Y. 602; *Kain v. Smith*, 80 N. Y. 453.

⁷ *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 50 Vt. 500.

⁸ *Kinney v. Crocker*, 18 Wis. 80; *Paige v. Smith*, 99 Mass. 395.

sale and the execution of the sheriff's deed thereon. After the receiver had appeared and answered in the action, a sheriff's deed was executed, and the receiver made final settlement and was discharged. It was held that the judgment subsequently rendered in the action against the receiver did not become a lien against the property in the hands of the purchaser at the foreclosure sale.¹ So a person who has recovered judgment against the receivers of a railroad for injuries received by him while travelling as a passenger upon the road is not entitled to payment out of the earnings of the road, or the proceeds of its sale, in preference to the first-mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers.² But inasmuch as a receiver of a railroad appointed in foreclosure proceedings is the agent of the bondholders and trustees, a judgment rendered against him by a court of competent jurisdiction for any of the expenses incident to operating the road is binding upon the interests of the bondholders.³ Judgments obtained against the corpo-

¹ *White v. Keokuk & Des Moines R. R. Co.*, 52 Iowa, 97.

² *Davenport v. Receivers of Alabama, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 519.

³ *Turner v. Indianapolis, Bloomington & Western R. R. Co.*, 8 Biss. (U. S. C. C.) 527. In a case before the United States court the mortgagor held a leased road, under a written lease, providing for rent and for payment for depreciation, and for the payment of a monthly rent by the lessor to the lessee for the use of a part of the road. The successive receivers took possession of the leased road and operated it as a continuation of the mortgaged road. Part of the rent which accrued before C. became receiver was unpaid. C., after he became receiver, paid the rent as it accrued. The successive receivers collected the rent monthly from the lessor for the use of a part of the road. The court allowed to the lessor, as a claim preferred to the first mortgage, a sum based on the actual value of the use of the road by the receivers, and for depreciation, and allowed, with a like preference, claims for supplies and materials furnished for the road while so operated. It was held that the allowances were proper, and that the final decree was not erroneous in not re-

quiring the accounts of the receiver to be settled before paying out of the proceeds of sale the debts allowed against him, or in ordering the sale of the property as an entirety, without separating that acquired by the receiver. *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286. A railroad company having, by contract, the right to run over the defendant's road, upon accounting to the defendant by the 15th of each month for the month preceding, and paying the ascertained balance due within ten days thereafter, and being three months in arrears, the receiver of the defendant road severed the connection between the roads. On petition to restore connection, and for damages for interruption of business, it was held that, under the circumstances, the petitioners were not entitled to relief on the ground of oppressive and unwarranted conduct on the part of the receiver. *Elmira Iron & Steel Rolling Mill Co. v. Erie R. R. Co.*, 26 N. J. Eq. 284. A receiver appointed by the governor has no right to so lease a railway as to vest the lessees with an interest which cannot be taken away by a subsequent act of the Legislature. *McMinnville & Manchester R. R. Co. v. Huggins*, 3 Baxter (Tenn.), 177; 20 Am. Ry. Rep. 178. A railroad company in

ration *after* a receiver is appointed do not constitute a lien upon the property,¹ and afford no evidence against the receiver.² Claims for damages *sued* against a corporation itself while in the hands of receivers, and reduced to judgment (in one case by consent of its officers, who were also the receivers), and afterwards presented and allowed as original claims against the receiver's fund, are not entitled, as against that fund, to interest, either from the date of the judgments or from the order giving to them the right of payment, — such order not having fixed the amounts due.³ Neither the railroad company itself, nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied.⁴ Nor can a railroad company, the fruits of whose labor and expenditures are about to be lost by the failure of its enterprise, in order to raise money to complete it, create liens upon its property which will displace an older lien, and no prerogative of a court of equity arms it with power to do so.⁵ Claimants for materials furnished an insolvent railroad company are not entitled to payment out of a fund in court arising from a sale of the corporate property at the instance of mortgage bondholders, until the bonds are paid. Such claimants have no specific lien upon the property, and promises of payment by the receiver do not change their rights; they can only take the surplus after prior specific liens have been discharged.⁶ In Georgia under the statute it is held that in distributing the earnings of a mortgaged railroad, while the same are in the hands of a receiver, and the proceeds of its sale,

Iowa, after executing a mortgage to secure its bonds, which was duly recorded, covering all the property which it then possessed or might thereafter acquire, entered into a written contract with A., leasing for a specific period and a stipulated sum, payable monthly, certain cars whereof he was the owner. It also reserved, but did not exercise the privilege of purchasing them at the original cost at any time during the existence of the contract. A. retained the right to rescind the contract if the company failed to pay the interest on its bonds. While the contract was in force, the mortgagee filed his bill of foreclosure. The court appointed a receiver, who took charge of the road and used the cars in operating it. The contract was never recorded. It was held that the contract was binding between the parties

thereto, and the failure to record it did not, under the statute of Iowa, render the cars subject to the lien of the mortgage; that A. was entitled to the possession of them and to compensation for their use by the receiver, payable out of the fund to the credit of the suit. *Myer v. Car Co.*, 102 U. S. 1.

¹ *Bell v. Chicago, &c. R. R. Co.*, 34 La. An. 785.

² *Connell v. Washington*, 2 Tenn. Ch. 323.

³ *Gibbs v. Greenville & Columbia R. R. Co.*, 18 S. C. 87.

⁴ *North Carolina R. R. Co. v. Drew*, 8 Woods (U. S. C. C.), 691.

⁵ *Meyer v. Johnston*, 53 Ala. 237.

⁶ *Denniston v. Chicago, Alton, & St. Louis R. R. Co.*, 4 Biss. (U. S. C. C.) 414.

the court will give priority only to those laborers and material men who had perfected their liens according to the State law.¹

The net earnings, while the road is in possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. Thus, from such earnings, payment may be made to parties who had, before his appointment, furnished the company with car-springs, and spirals, and supplies for its machinery department, which he continued to use in carrying on the business of the road.² In the first case cited in the last note,³ the petitioner paid an indebtedness of the railway company incurred on account of construction, and it was held that in order to give him a superior equity to the bondholders, it must be alleged and proved that he acted under such inducements from them, and had such dealings with them in the transaction, as estop them from asserting their liens against his claim. Back pay due the employés of a railway company at the time the company's property was placed in the hands of a receiver, by extending the order appointing the receiver, was ordered to be paid out of the net earnings of the roads which came to the hands of the receiver, and the bondholders at whose instance the receiver was appointed were postponed until the wages of the employés were first paid out of the net earnings in the hands of the receiver. The mortgagees accepted their securities with knowledge that the company, though technically a private corporation, was under obligations to the State to render certain important public services. The mortgagees knew that the railroads were in a certain sense public highways, and that whoever owned them or held them in pledge was bound to see that they were at all times so operated as to subserve the public convenience.⁴ In another case, wages due employés and past due for eight months, at the time of the appointment of the receiver, were ordered to be paid where the employés were retained in the service of the receiver; but payment of such claims in the hands of third parties was refused.⁵ But a person who furnishes the labor or services of others, under a contract to do the whole business of a corporation, or a par-

¹ *Jessup v. Atlantic & Gulf R. R. Co.*,
³ *Woods* (U. S. C. C.), 441.

² *Hale v. Frost*, 99 U. S. 339. See also, *Williamson v. Washington, Va. Midland, &c. R. R. Co.*, 33 Gratt. (Va.) 624; *Taylor v. Philadelphia & Reading R. R. Co.*, 7 Fed. Rep. 377.

³ *Hale v. Frost*, *ante*.

⁴ *Douglas v. Cline*, 12 Bush (Ky.), 608.

⁵ *Skiddy v. Atlantic, Miss., & Ohio R. R. Co.*, 3 Hughes (U. S. C. C.), 320; *Duncan v. Chesapeake & Ohio R. R. Co.*, 9 Am. Ry. Rep. 386.

ticular branch of it, is not an employé, but a contractor.¹ A judgment creditor of a railway company, with an execution in the hands of the sheriff, the road not then being in the hands of a receiver, is entitled to have a receiver appointed to take charge of the earnings of the road and to apply the profits upon his demand.² If at the time a receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff, and there are funds derived from income and balances due from employés in the hands of or due to the company, the execution creditors are entitled to have these funds and balances applied to the satisfaction of their debts in preference to the trust creditors. If these funds or balances have been applied under the order of the court to other debts, they will be replaced out of the revenues received by the receiver since his appointment.³

A court has the power to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage. Thus it may provide that the receiver shall pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and pay indebtedness not exceeding a certain sum to other connecting lines, for materials and repairs, and for ticket and freight balances, a part of which had been incurred more than ninety days before the order appointing him was made, and purchase rolling-stock, and build a certain number of miles of road and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgages.⁴ But a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.⁵ A cause of action against a railroad

¹ *Lehigh Coal & Navigation Co. v. Central R. R. Co. of New Jersey*, 29 N. J. Eq. 252.

² *Peto v. Welland Ry. Co.*, 9 Grant Ch. (U. C.) 455.

³ *Gibert v. Washington, Va. Midland, &c. R. R. Co.*, 33 Gratt. (Va.) 645.

⁴ *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286.

⁵ *Cowdrey v. Galveston, Houston & Henderson R. R. Co.*, 93 U. S. 352.

company for damages for the destruction of property along the line of its road, by fire escaping from defective locomotives, is in no proper sense to be considered such a claim as to constitute part of the operating expenses of the road, and is wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which are sometimes ordered paid from the net earnings in the hands of a receiver, as presenting equities superior to those of the bondholders.¹ If a garnishee, after service of process upon him, delivers property of the principal debtor to a receiver subsequently appointed in another suit to take charge of all the property of the debtor, he does so at his peril, but will have the right to allege and show that such receiver was entitled to the possession of the property as against the plaintiff in garnishment.² But a receiver may be garnished.³

After the appointment of a receiver of an insolvent corporation, and proceedings in foreclosure, an agreement among the secured and general creditors of the corporation was entered into, whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent, payable half-yearly," and the interest was to be paid, if the company should "be able to pay it by its income, after paying claims prior thereto within one year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed. It was held that the committee had authority to consent that the bonds should be made payable, at the option of the company, on or before the expiration of thirty years from the date of their issue; and held, also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid.⁴ Where an injunction is granted by a State court and served on a railway company, restraining it and its servants from obstructing a public avenue in a city with its trains, etc., the same will be binding upon a receiver of the company subsequently appointed by the United States court, and such receiver, the same as a subsequent purchaser, will be punishable for contempt for disobeying the mandate of the writ. If the receivers of a corporation disobey an injunction against the corporation, made before their appointment, the fact that they

¹ *Hiles v. Case*, 14 Fed. Rep. 141.

⁴ *Lehigh Coal & Navigation Co. v.*

² *Crerar v. Milwaukee & St. Paul R. R. Co.*, 35 Wis. 67.

Central R. R. Co. of New Jersey, 34 N. J. Eq. 88.

³ *Phelan, &c. v. Ganebin*, 5 Col. 14.

have been removed, at the time they were tried for a contempt, affords no defence whatever.¹ The court will authorize a receiver of a railway company to make all necessary repairs, and, if necessary, will charge the expense as a first lien on the property prior to existing mortgages thereon.²

Rolling-stock purchased by the receivers managing the railroad corporation, pending its sale by the court of chancery, is subject to the liens authorized by the court in the order for its purchase, and such liens cannot be superseded or lessened by the trust deed.³ Where the net earnings of a railway which is in the hands of receivers are amply sufficient to pay for a necessary purchase of additional rolling-stock, the court will not authorize the receivers to raise money for the same by the creation of a car trust, in order to allow of the application of the income to the bondholders.⁴ An application to compel the receivers of an insolvent railroad company to deliver to creditors certain certificates of indebtedness, which the receivers were authorized by the court to issue, and which they had offered to such creditors in payment of rolling-stock, and which the creditors had accepted was refused,—the creditors having had it in their power to retake their property at any time, and it appearing that it would have been to the disadvantage of the trust fund for the receivers to have paid the contract price.⁵ Where a receiver was directed by an order of the court “to continue in the possession and management of the property,” and in good faith he borrowed money necessary for its proper management, it was held that the lender was entitled to be repaid from the earnings of the road while in the receiver’s hands, in preference to the holders of second-mortgage bonds.⁶ The court may, where the property is insufficient to meet the mortgage indebtedness, under certain circumstances, order it sold by the receiver pending the foreclosure proceedings. Thus the indebtedness of the West Line R. R. Co. being more than double its assets, there being no income to meet the expense of the necessary repairs, its property being of such a character as materially to deteriorate in value pending a protracted litigation; and it being clearly for the interest of all concerned in the property that it should be

¹ *Safford v. The People*, 85 Ill. 558.

² *Hoover v. Montclair & Greenwood Lake R. R. Co.*, 29 N. J. Eq. 4; *Mitchell, ex parte*, 12 S. C. 83.

³ *Meyer v. Johnston*, 53 Ala. 237.

⁴ *Taylor v. Philadelphia & Reading R. R. Co.*, 9 Fed. Rep. 1.

⁵ *Coe v. New Jersey Midland R. R. Co.*, 27 N. J. Eq. 37.

⁶ *Ex parte South Carolina Bank*, 18 S. C. 239; *Ex parte Williams*, 18 id. 299.

sold as early as possible, and almost all the first-mortgage bondholders represented by the trustees asking for the sale,—the road and its franchises were ordered to be sold by the receiver, pending proceedings for foreclosure by trustees for the first-mortgage bondholders, which disputes about the extent and validity of the mortgage lien threatened greatly to delay. The property was directed to be sold free from all incumbrances, except a mortgage held by the public school fund of the State on lands under water.¹ In another case a railroad and other property of a railroad company, which had for several years been in the hands of a receiver, were sold by a decree of the court, which directed a sale of the road, the franchises of the company, right of way, depots, rolling-stock, tools, and all other property of the company, real, personal, and mixed. It was held that the purchaser was not entitled to the money, the surplus earnings of the railroad in the hands of the receiver; and that the purchaser was entitled to all cars, engines, and other property placed on the railroad by the receiver in the discharge of his duty, to carry on the business of the railroad and keep it in repair.² It is a proper exercise of the chancery power of the court to surrender the trust property to the purchaser, retaining jurisdiction of the original case, and retaining the authority to enforce the payment of the debts and liabilities incurred by the court's receiver in the operation of the railway. Where a railway receiver was discharged, and the sale of the property confirmed to a newly organized corporation, with the provision in the order of confirmation that the new company should pay all the debts of the receiver and all claims or liabilities in the foreclosure case, it was held that the new company could not be permitted, after accepting the property, to question the validity of the order.³ As a general rule a receiver appointed in one suit should not be displaced by the appointment of a receiver in a subsequent action. The receivership in the first suit should be extended to the second. But, however, if a different receiver is appointed, and the court has jurisdiction of the subject-matter and the parties, and is the same court that made the first appointment, the receiver in the first suit must deliver the property to the second receiver.⁴ Where no lien is created by a contract, it will not be specifically enforced against the receiver.

¹ *Middleton v. New Jersey West Line R. R. Co. of Iowa*, 17 Fed. Rep. 758; *R. R. Co.*, 26 N. J. Eq. 269. *Brown v. Wabash R. R. Co.*, 96 Ill.

² *Strang v. Montgomery & Eufaula*, 297.

R. R. Co., 3 Woods (U. S. C. C.), 613.

⁴ *State v. Jacksonville, &c. R. R. Co.*,

³ *Farmers' Loan & Trust Co. v. Central*, 15 Fla. 201.

Thus a contract between A., a railroad company, and B., an express company, stipulated that B. should lend A. \$20,000, to be expended in repairing and equipping its road, and that A. should grant to B. the necessary privileges and facilities for the transaction of all the express business over the road, the sum found to be due A. therefor, upon monthly settlement of accounts, to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when if the money with interest thereon was not paid, it was to continue in force until payment should be made. After B. had advanced the money, and entered upon the performance of the contract, A. conveyed all its property, including its franchises, to C. in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C. brought a foreclosure suit, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B., the latter, with the consent of the court, brought its bill in equity for specific performance against him, A., and C. It was held that the receiver is the only necessary party defendant; that the transaction between the companies is not a license, but simply a contract for transportation, creating no lien, the specific performance whereof would be a form of satisfaction or payment which the receiver cannot be required to make.¹ The imperative necessity that a railway should be kept in proper repair and operation, necessarily carries authority upon the part of a court appointing a receiver to authorize him to incur liabilities which shall take precedence over all other claims which are indispensable for the preservation of the property while the litigation is pending. Otherwise the interests of the bondholders or creditors, as well as of the corporation itself, would be sacrificed.² Therefore the court may authorize him to borrow money and issue certificates or other obligations therefor, which shall be a lien upon the property prior to the mortgage, to complete an unfinished portion of the road,³ to make repairs thereon,⁴ to pay the rent upon leased lines,⁵ or for materials furnished, for labor, or indeed for any obligation *which is necessary to preserve, maintain, and operate the road in a suitable manner.*⁶ *The*

¹ Express Co. v. R. R. Co., 99 U. S. 191.

⁴ Meyer v. Johnston, *ante.*

² Meyer v. Johnston, 53 Ala. 237.

⁵ Vt. & Canada R. R. Co. v. Vt. Central R. R. Co., 50 Vt. 500.

³ Stanton v. Alabama, &c. R. R. Co., 2 Woods (U. S. C. C.), 506. See also Jerome v. McCarter, 94 U. S. 734, where such authority was given, to complete a canal.

⁶ Coe v. New Jersey Midland R. R. Co., 27 N. J. Eq. 37.

necessity of the expenditure affords the true test of its propriety as well as of the measure of the authority of the court to permit it and create a prior lien upon the road therefor,¹ unless the bondholders or other

¹ *Cowdrey v. Galveston, &c. R. R. Co.*, 1 Woods (U. S. C. C.), 331. The court may authorize the receiver to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise, except to a very limited extent, the sound practice is to discharge the receiver or stop running the road and speed the foreclosure. But it is not a judicial duty to build railroads; and the agreement or assent of all the parties interested in the property cannot make it one; and there is no difference in principle between a court building a railroad by the issue of receivers' certificates and making extensive and general repairs and betterments, approximating the original cost of construction by like means. Such certificates reciting upon their face that they were issued under the order of court, the holder is chargeable with the notice of the order, and in taking them is bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time. *Credit Co. v. Arkansas Central R. R. Co.*, 15 Fed. Rep. 46. An application by receivers of an insolvent railroad to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of which was not before the court. *Coe v. New Jersey Midland R. R. Co.*, 27 N. J. Eq. 37. And the court will not generally authorize the issue of receivers' certificates of indebtedness, unless a detailed statement is first made out specifying the items of the sum needed and the purposes to which it is to be applied, supported by clear proof of the correctness thereof, and of the necessity for raising the money, and after proper notice to, and hearing of, the parties interested. *Meyer v. Johnston*, 53 Ala. 237. Where a court orders a receiver to issue

certificates of indebtedness for a specific purpose, to be made payable to the persons to whom delivered or order, and one is issued to A. B. or bearer, which is negotiated by mere delivery, the holder will take the same subject to all equitable defences against the payee; and the printed order of the court on its back is notice to him that it was made payable to bearer contrary to the order of the court authorizing the issue. *Turner v. Peoria, &c. R. R. Co.*, 95 Ill. 134. A court of chancery has power, after proper notice to and hearing of interested parties, to authorize the issue even of negotiable certificates of indebtedness, creating a first lien, displacing other liens to that extent, on the property of a railroad which it is operating through its receiver, whenever it is necessary to raise money for the economical management and conservation of the property. *Meyer v. Johnston*, 53 Ala. 237. But where a receiver of a railroad was, by order of court, authorized to issue receivers' certificates to a certain amount, the proceeds to be used in operating the road, and to be paid out of the receipts of the road, an issue of certificates in excess of the amount ordered was beyond the power of the receiver, and as to such excess, the certificates were void even in the hands of an innocent holder, and constituted no claim upon the money in the hands of the receiver. *Newbold v. Peoria & Springfield R. R. Co.*, 5 Brad. (Ill.) 367. These certificates are not ordinarily negotiable. Where a receiver, acting under a special order of the court, issued a certificate and placed it in the hands of the payee named therein for negotiation and sale, and the same subsequently came into the hands of the petitioner, who purchased it of a third party for forty per cent of its par value, and with notice of the order under which it was issued, it was held that he took it subject to all equities between the receiver and the payee, and that, as it appeared that the latter had never accounted to the receiver for the certificate or its proceeds, the petitioner was not entitled to payment.

parties in interest have asked for such authority, or knowing of the application to the court for such authority have not objected thereto, in which case they cannot complain that their securities are made subsidiary.¹ Upon no other ground, except in those States where the statute so provides,² can it with any reason or propriety be held that the receiver can displace the mortgage, except for purposes absolutely necessary and indispensable to preserve the property in the condition in which it was received.³ These certificates are held not to be commercial paper, and therefore not strictly negotiable even though made payable to bearer or the order of a certain person, and the holder takes them subject to all existing equities.⁴

The negotiation and sale of certificates is a trust personal to the receiver; he cannot delegate it to another and relieve himself from responsibility. *Union Trust Co. v. Chicago & Lake Huron R. R. Co.*, 7 Fed. Rep. 513.

¹ *Jerome v. McCarter*, *ante*.

² As in New Jersey, Ohio, and Vermont, where receivers are authorized to create a prior lien upon the property for certain purposes.

³ *Jerome v. McCarter*, *ante*.

⁴ *Stanton v. Alabama, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 506. In *Bank of Montreal v. Chicago, &c. R. R. Co.*, 48 Iowa, 518, an order of court appointing a receiver of a railroad company provided that he should do all things necessary to be done to complete the line of the road; that he borrow the money necessary therefor, and issue his debentures or certificates therefor; and that such certificates, "whether for money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," should be treated as receiver's indebtedness, and constitute a first lien on the road. It was held, 1. That the receiver was not authorized to issue certificates in payment of material until it had been furnished; and that certificates issued by him for material contracted for, but never delivered, were void. 2. That such certificates reciting upon their face that they were issued under an order of court, the holder was chargeable with notice of the order, and, in taking them, was bound to inquire whether the receiver

had power to issue them in payment for material to be delivered at a future time. A certificate of indebtedness issued by a receiver, under an order of the court appointing him to pay debts and expenses incurred by his predecessor, not on account of any indebtedness made by the former receiver or for which the receiver issuing it received any benefit from the payee, or any one else, is not entitled to be paid out of any funds in the hands of the receiver, either at the suit of the payee or holder for value. They are wanting in nearly every essential quality of negotiable commercial paper, as they are not payable unconditionally out of any fund. Whether they are payable in full, or only *pro rata*, depends on the fact of the sufficiency of the fund under the control of the court. There is no personal liability on any one for their payment. Only the fund which the court controls is bound, and that only when it is equitable to charge it with the payment of the money evidenced thereby. Their payment can only be coerced by application to the court having control of the trust property for an order upon its acting officer. *Turner v. Peoria & Springfield R. R. Co.*, 95 Ill. 134. Except under extraordinary circumstances, the power of the court ought never to be exercised in enabling the trustees, where the railroad is unfinished, to borrow money by means of receivers' certificates, which create a paramount lien upon the property, in order to complete the work. *Shaw v. R. R. Co.*, 100 U. S. 605; *Stanton v. Alabama, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 506.

SEC. 484. Removal or Discharge of a Receiver.—Inasmuch as a receiver is the agent of the court in the administration of the trust, its power to remove him is unquestioned, and is implied from the power to appoint,¹ and rests in the discretion of the court,² and will be exercised for any irregularity or mal-administration of his duties which is brought to the attention of the court, even in an irregular manner.³ In any event, a receiver will be discharged when the debt has been discharged to secure the payment of which he was appointed, or when it appears that the security of the creditor no longer requires his retention.⁴ An order discharging a receiver is not appealable, as the matter rests in the discretion of the court.⁵ No action can be maintained against the receiver of a railroad after such officer has been discharged and the property transferred to a purchaser under an order of the court in foreclosure proceedings. Such purchaser, however, takes the property subject to all claims against the receiver when the court has reserved its jurisdiction, upon final decree, to enforce as liens upon the property all liabilities incurred by such receiver.⁶ In a New York case, the plaintiff brought an action in March, 1880, against the defendant as receiver of the Erie R. R. Co., to recover for services rendered to him from December 1, 1875, to January 31, 1877. More than sixty days prior to the commencement of the action all the property and franchises of the old company had been sold, and the purchasers had, pursuant to chapter 430 of the acts of 1874, formed a new corporation, and the defendant had been discharged from his receivership. By these facts the plaintiff was under the statute prevented from maintaining the action against the receiver, but the new company was thereby subjected to the same liability as had formerly existed against him. It was held that it was proper to allow the plaintiff to amend the summons and complaint by striking out the name of the defendant and substituting that of the new corporation, although issues had been joined in the action and sent to a referee for trial; and that, as the reference had been ordered by consent, that order should be vacated.⁷

¹ Railroad Co. v. Sloan, 31 Ohio, 1.

² McCullough v. Merchants', &c. Co., 29 N. J. Eq. 217.

³ Cob v. N. J. Midland R. R. Co., *ante*.

⁴ Howard v. La Crosse, &c. R. R. Co., 1 Woolw. (U. S. C. C.) 49.

⁵ Colgate v. Michigan, &c. R. R. Co.,

28 Mich. 288; Milwaukee, &c. R. R. Co.

v. Soutter, 2 Wall. (U. S.) 510; Washington, &c. R. R. Co. v. Southern Maryland R. R. Co., 35 Md. 153.

⁶ Farmers' Loan & Trust Co. v. Central R. R. Co. of Iowa, 7 Fed. Rep. 537.

Abbott v. Jewett, Receiver, 25 Hun (N. Y.), 603.

SEC. 485. Compensation, etc., of Receiver.—The receiver is required to report to the court from time to time, as to his administration of the trust according to the terms of the order appointing him; or at such times as the court may direct, and before his final discharge, he must make a report embracing an account of all his receipts and disbursements in the management of the property, and his accounts are generally referred to a master, upon whose report, unless errors have been committed by him, the receiver will be discharged, upon paying over such balance as may be in his hands as directed by the court, and turning over the property to the parties entitled to receive it under the order of the court. He is entitled to compensation in proportion to the magnitude of the trust and the nature of the responsibilities assumed and duties discharged by him, and the manner in which he discharged them, and such an allowance will be made to him as is fair and reasonable in view of these circumstances.¹ It is evident that no fixed standard can be adopted as to compensation, as the duties and responsibilities vary in each case. A receiver of a short line of railway, whose management is simple, would not be entitled to as much compensation as the receiver of a railway whose line is long, and system complex, demanding constant care and vigilant attention; and in every case this circumstance, as well as the others referred to, will be regarded, and the compensation awarded measured accordingly.

¹ *Jones v. Keen*, 115 Mass. 170; *Cowdrey v. Galveston, &c. R. R.*, 1 Woods (U. S. C. C.), 331; *McArthur v. Montclair R. R. Co.*, 27 N. J. Eq. 77.

CHAPTER XXXI.

CONSOLIDATION : LEASES.

SEC. 486. Two Roads can be Consolidated, when: Effect of.	SEC. 488. Effect of Consolidation upon Subscriptions to Stock.
487. Effect of Consolidation upon Jurisdiction of different States.	489. Power to Lease.
	490. Effect of a Lease.

SEC. 486. **Two Roads can be Consolidated, when: Effect of.**— Unless legislative authority to do so is given in the charter or by general or special statute, a railway company has no power to consolidate its railway and franchises with another.¹ If the power to consolidate with other roads is withheld, it is regarded as a prohibition against the exercise of it. But the legislature may confer this authority either in the charter or by statute, and when acted upon, the two corporations become united in interest and capacity, and form one single corporation.² The power to consolidate, when exercised, is regarded as a new charter,³ and generally the old corporations are dissolved, and their franchises are conferred upon the new company;⁴ and unless the statute or articles of consolidation make express provision therefor, the new corporation assumes all the liabilities of the old ones,⁵ at least in equity, to the extent of the

¹ *State v. Bailey*, 16 Ind. 46; *Bishop v. Brainerd*, 28 Conn. 289; *State v. Maine Central R. R. Co.*, 66 Me. 488.

² *State v. Maine Central R. R. Co.*, *ante*; *Com. v. Atlantic, &c. R. R. Co.*, 53 Penn. St. 9; *Phila., &c. R. R. Co. v. Maryland*, 10 How. (U. S.) 376; *Meyer v. Johnston, ante*; *Paine v. Lake Erie, &c. R. R. Co.*, 31 Ind. 283; *State v. Sherman*, 22 Ohio St. 411; *McMahon v. Morrison*, 16 Ind. 172; *Indianapolis, &c. R. R. Co. v. Jones*, 29 Ind. 465; *Boston, &c. R. R. Co. v. Midland R. R. Co.*, 1 Gray (Mass.), 346; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

³ *State v. Maine Central R. R. Co.*, *ante*.

⁴ *Meyer v. Johnston*, 53 Ala. 237;

Clearwater v. Meredith, 1 Wall. (U. S.) 25; *Miller v. Lancaster*, 5 Cold. (Tenn.) 514; *Eaton, &c. R. R. Co. v. Hunt*, 20 Ind. 457; *Columbus, &c. R. R. Co. v. Powell*, 40 Ind. 37; *Indianapolis, &c. R. R. Co. v. Jones, ante*. Whether they are dissolved or not depends upon the intent of the legislature manifested by the act authorizing it. *Central R. R. Co. v. Georgia*, 92 U. S. 665.

⁵ *Miller v. Lancaster*, 5 Cold. (Tenn.) 514; *Harrison v. Union Pacific R. R. Co.*, 13 Fed. Rep. 522; *Caley v. Coburg, &c. Ry. Co.*, 14 Grant's Ch. (U. C.) 531; *Tysen v. Wabash R. R. Co.*, 11 Biss. (U. S. C. C.) 510; 15 Fed. Rep. 563; *Columbus, &c. R. R. Co. v. Powell*, 40 Ind. 37.

property received by it from the old corporation, and it is also liable at law.¹ An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation. Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come.² A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement.³ Where two or more railroad companies are consolidated, as far as creditors of one of the original companies are concerned, the consolidated company is successor of the old company; but in respect to the properties of the other companies, it is a new and independent company; and such creditors have no claim against it upon the original contracts, but only by virtue of its assumptions of the obligations of the old companies.⁴ It takes the property subject to the debts and liabilities of the original companies, and burdened with all liens upon it which were valid against those companies, and will not be permitted to aver ignorance of an unrecorded mortgage previously executed by one of the original companies;⁵ and where the company thus formed assumes a new name, the company may be sued by the new name thus assumed, and it will be estopped from denying the name by which it is sued.⁶ Indeed, after one railroad company has consolidated with another as allowed by their respective charters, and authorized and confirmed by legislative acts conferring all rights, powers, and privileges belonging to either on the new company thus formed, all liabilities of either can thenceforward only be enforced against and in the name of the consolidated company.⁷ But this rule is restricted to voluntary

¹ *Harrison v. Arkansas, &c. R. R. Co.*,
4 *McCrary* (U. S. C. C.), 264.

² *Powell v. North Mo. R. R. Co.*, 42
Mo. 63.

³ *Paine v. Lake Erie & Louisville R. R.*
Co., 31 Ind. 283.

⁴ *Prouty v. Lake Shore & Michigan*
Southern R. R. Co., 52 N. Y. 363.

⁵ *Mississippi Valley Co. v. Chicago,*
St. Louis, & New Orleans R. R. Co., 58
Miss. 846.

⁶ *Columbus, Chicago, & Indiana Cen-*
tral R. R. Co. v. Skidmore, 69 Ill. 566.

⁷ *Indianola R. R. Co. v. Fryer*, 56 Tex.
609.

consolidations, as the foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest on agreement, either express or implied.¹ A statute which provides that, in case of the consolidation of two or more railroad companies, the consolidated company shall be liable for all debts of each company entering into the arrangement, is not retrospective, but is designed to apply to companies which might consolidate after its passage.² The result of consolidation under a statute is that the statute becomes part of the contract of consolidation; the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. The consolidated company is substituted for them. Unsecured debts of the latter remain unsecured debts of the former. The consolidated company may execute a mortgage upon all of the consolidated property which would be paramount to the unsecured debts of the constituent companies.³ The liability of the consolidated company extends to personal injuries. Thus, in August, 1879, the Kansas Pacific R. R. Co. owned and operated a line of railway through the city of Lawrence, and while operating its railroad one of its trains injured the plaintiff. In January, 1880, the Kansas Pacific R. R. Co., the Denver Pacific Co., and the Union Pacific R. R. Co., entered into an agreement of consolidation, by which agreement they formed, or attempted to form, the Union Pacific R. R. Co., and to such company, by the articles of consolidation, transferred all their respective properties. The articles of consolidation expressly stipulated that the consolidated company should not be liable for the individual debts of the constituent companies, but that such constituent companies should continue in existence for the purpose of adjusting all claims and demands; and also that the consolidation should not prevent the enforcement of any valid obligation or liability of either constituent company against the properties so transferred by such constituent company. It was held that before the plaintiff could maintain an action against the consolidated company, he must, by an action against the Kansas Pacific R. R. Co., the party which did the injuries, convert his unliquidated claim into a liquidated demand, and have both the fact and the amount of that company's liability adjudicated.⁴ Where an act of the legislature, consolidating two rail-

¹ *Houston & Texas Central R. R. Co. v. Shirley*, 54 Tex. 125.

² *Hatcher v. Toledo, Wabash, & Western R. R. Co.*, 62 Ill. 477.

³ *Tysen v. Wabash R. R. Co.*, 15 Fed. Rep. 763.

⁴ *Whipple v. Union Pacific R. R. Co.*, 28 Kan. 474.

road companies into one under a new name, provided that the consolidation and change of name "shall in no way affect the rights of the creditors of said companies, and their separate existence shall be continued as to all the rights and remedies of creditors;" and that the president of the new company "shall be held in law, as to service of process, as the president of" each of the old companies; and that the new company "may dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same, and sue for and recover in its name all debts, dues, and demands, of every kind and description whatsoever, due to each of said companies," — it was held that an action at law might be maintained against the new company, to recover damages for personal injuries caused by the wrongful act of one of the old companies.¹ Where two or more railway companies are consolidated, and the new company assumes the debts and obligations of the original companies, the directors or other officers of the new organization are not necessary or proper parties to an action brought by a holder of preferred and guarantied stock of one of the old companies to enforce an alleged contract made by it to pay specified dividends upon said stock.² So the new company is answerable for the torts of the old companies. Thus, a petition by a guardian alleged that his wards were owners in fee simple of a certain woodland; that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used, and possessed for its own use, and without any authority whatever, by a certain railroad company, which company was afterwards consolidated with another railroad company, etc. It was held on demurrer that the petition stated sufficient facts to constitute a cause of action for the conversion of personal property as against the consolidated company.³ A corporation becoming consolidated with another, and changing its name while a suit is pending against it, is not so dissolved, nor its original liability so extinguished, that the pending suit abates;⁴ and the plaintiff has a right to treat it as having a separate existence for the prosecution of his action against it. The action of the legislature authorizing, and

¹ *Warren v. Mobile & Montgomery R. R. Co.*, 49 Ala. 582.

² *Chase v. Vanderbilt*, 62 N. Y. 307.

³ *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *Stephenson v. Texas, &c. R. R. Co.*, 42 Tex. 162; *Coggin v. Central R. R. Co.*, 62 Ga. 685; *New Bedford*

R. R. Co. v. Old Colony R. R. Co., 120 Mass. 397; *Texas, &c. R. R. Co. v. Murphy*, 46 Tex. 356; *Chicago, &c. R. R. Co. v. Moffett*, 75 Ill. 124.

⁴ *East Tenn. & Ga. R. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

the corporation in acting under such authorization, cannot defeat or prejudice the right of a plaintiff in suits pending against it. As to such the corporation exists for the purpose of judgment; as to them it has not lost its individuality or identity. The act of the corporation cannot defeat the rights of persons holding claims against it.¹ A judgment against a consolidated company may be executed against the respective companies, although they have been dissolved by judicial action.² Persons who purchase bonds of a railway company while a statute is in force authorizing the consolidation of railways must be held to have contemplated, at the time of the purchase of the bonds, that the company issuing them might consolidate with other companies.³ A mortgage outstanding upon one railroad at the time when a consolidation is effected remains a valid security thereon; and the same is true as to all liens which have attached thereto.⁴

SEC. 487. Effect of Consolidation upon Jurisdiction of different States.—Where railway companies in different States are consolidated, the several States still retain jurisdiction over that portion of the road lying in each, and each is subject to the legislation of the State in which it lies,⁵ however diverse such legislation may be.

¹ *Shackleford v. Mississippi Central R. R. Co.*, 52 Miss. 159.

² *Ketcham v. Madison, &c. R. R. Co.*, 20 Ind. 260.

³ *Tysen v. Wabash R. R. Co.*, 15 Fed. Rep. 763.

⁴ *Ritter v. Union Pacific R. R. Co.*, 12 Am. & Eng. R. R. Cas. 374 (U. S. C. C.); *Hazard v. Vt. & Canada R. R. Co.*, 17 Fed. Rep. 753.

⁵ *Eaton, &c. R. R. Co. v. Hunt*, 20 Ind. 457. Where a railroad corporation was made up of four distinct corporations, chartered by the legislatures of different States, and all consolidated and merged into one corporation under the laws of such States, and becomes one of that class of corporations owning a railroad extending through two or more States and chartered under the laws of each State, having a common stock, the same shareholders and officers, the same property, and a single organization, it is for most purposes one corporation. But it is a separate corporation in each State, in so far that it is governed by the laws of each within its own territory, and is considered to have a domicile in each State; and, in the ab-

sence of any statutory provision to the contrary, may hold its meetings and transact its corporate business in either State. *Graham v. Boston, Hartford & Erie R. R. Co.*, 14 Fed. Rep. 753. Several States may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one State may, without thereby creating a new corporation, authorize a corporation of another State to carry on business within its territory. *Copeland v. Memphis & Charleston R. R. Co.*, 3 Woods (U. S. C. C.), 651. Where a new corporation is formed by amalgamation under the authority of the State, of two or more distinct corporations into one, it succeeds to all the rights of the several components, and is subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected. *Chicago, Rock Island, & Pacific R. R. Co. v. Moffitt*, 75 Ill. 524. After consolidation the new company becomes liable to perform the duties required of the railroad companies so consolidated; and if no part of the fran-

Rights vested in the respective corporations pass to and vest in the new corporation, and these, of course, the legislature of none of the States can impair. Therefore, where by the terms of the charter, one of the corporations was exempt from taxation, unless the removal of this exemption was made a condition of its right to consolidate, the exemption vests in the new corporation.¹

SEC. 488. Effect of Consolidation upon Subscriptions to Stock. —

If two or more railway companies consolidate before the subscriptions to the stock thereof have been paid, under authority obtained subsequent to the subscriptions, or if by the consolidation the object and purposes of the original enterprise are radically changed, it is held that such subscriptions to the stock, whether by municipal corporations or individuals, are thereby discharged,² unless such sub-

chise is reserved to either of the old companies, they will not be liable to the public for the performance of duties devolving upon the new companies. *Peoria & Rock Island R. R. Co. v. Coal Valley Mining Co.*, 68 Ill. 489. A new corporation may be created by the union of two or more corporations, and its powers and privileges designated by reference to the charters of other companies, as well as by special enumeration. *Railroad Co. v. Maine*, 96 U. S. 499. The legislature may incorporate a new and distinct corporation out of two or more previously existing corporations. And where a new corporation is thus formed, and by the act is to "have the powers, privileges, and immunities possessed by each of the corporations" whose union constitutes such new corporation, the new corporation will have only the privileges, powers, and immunities which the corporation with the fewest privileges, powers, and immunities possessed, and which were common to all. This rule applies to exemption from taxation. *State v. Maine Central R. R. Co.*, 66 Me. 488. All statutory conditions must be complied with, and if an election of a board of directors of the consolidated corporation is by the statute clearly made a condition precedent to its acquiring the rights and franchises of the original corporations, or if the filing of a duplicate of the consolidation agreement in the office of the Secretary of State, after being duly made and submitted to the stock-

holders and confirmed by them, is by the statute made a condition precedent to a merger of the original corporations, there can be no valid action as a consolidated corporation until that is done; and any attempted election of directors of the consolidated corporation before that is without warrant and ineffectual. *Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Drinker*, 30 Mich. 124. If a member of a board of directors of a corporation be present at the adoption of a resolution, and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the consolidation. *Mowrey v. Indianapolis & Cincinnati R. R. Co.*, 4 Biss. (U. S. C. C.) 78.

¹ *State v. Comm'r of Railroad Taxation*, 37 N. J. L. 243; *Philadelphia, &c. R. R. Co. v. Maryland*, 10 How. (U. S.) 376; *Chesapeake, &c. R. R. Co. v. Virginia*, 94 U. S. 718; *Delaware R. R. Co. v. Cox*, 18 Wall. (U. S.) 206; *Branch v. Charleston*, 92 U. S. 677.

² *Martin v. Junction R. R. Co.*, 12

scribers have acquiesced in the change. But a municipal corporation has no power to acquiesce in a radical change in the original plan which so far changes the enterprise that the vote in favor of the subscription does not apply to the new enterprise.¹ This rule, however, does not apply where authority to consolidate existed when the subscription was made or the vote was taken.² The stockholders of the respective roads are not *ipso facto* in the new corporation, but only have a right to become so by surrendering their old stock for the new; but their property interest remains unchanged until the exchange is made,³ and the company cannot divest them of this interest.

SEC. 489. Power to Lease.—It is generally held that a railway company has no power, unless authorized so to do by statute, to lease or otherwise transfer its franchises or roads;⁴ and this rule applies to railway companies organized under general statutes as well as under special charters.⁵ It has been held that in the absence of any statute which forbids it, a railway company may lease its road, provided the lease is not against public policy.⁶ In most of the charters there is a provision that the company may lease its road, or the general statute so provides; and where such authority is conferred, no question can arise as to the power of the company in this respect. But where the statute imposes certain conditions, a lease made in pursuance thereof must fully comply therewith, or it will be invalid.⁷

Ind. 605; *Harshman v. Bates County*, 92 U. S. 569; *McCray v. Junction R. R. Co.*, 9 Ind. 358.

¹ *Clearwater v. Meredith*, 1 Wall. (U. S.) 40; *State v. Commissioners of Nehama County*, 10 Kan. 569; *McMahan v. Morrison*, 16 Ind. 172.

² *Mansfield, &c. R. R. Co. v. Brown*, 26 Ohio St. 223; *Sparrow v. Evansville, &c. R. R. Co.*, 7 Ind. 369.

³ *McCray v. Junction R. R. Co.*, *ante*; *Philadelphia, &c. R. R. Co. v. Catawissa R. R. Co.*, 53 Penn. St. 20.

⁴ *Troy, &c. R. R. Co. v. Boston, Hoosac Tunnel, &c. R. R. Co.*, 86 N. Y. 107; *Pittsburgh, &c. R. R. Co. v. Bedford, &c. R. R. Co.*, 81½ Penn. St. 104; *Woodruff v. Erie R. R. Co.*, 25 Hun (N. Y.), 246; *Hinckley v. Gildersleeve*, 19 Grant's Ch. (U. C.) 212; *Attorney-General v. Niagara Falls Bridge Co.*, 20 id. 34; *Thomas v. Railroad Co.*, 101 U. S. 71; *Archer v. Terre Haute, &c. R. R. Co.*, 102 Ill. 493.

But in England it is held that one railway company has the right to lease its road for the use of another. *Midland Ry. Co. v. Great Western Ry. Co.*, L. R. 8 Ch. App. 841.

⁵ *Abbott v. Johnstown, &c. R. R. Co.*, 80 N. Y. 27.

⁶ *Pittsburgh, &c. R. R. Co. v. Columbus, &c. R. R. Co.*, 8 Biss. (U. S. C. C.) 456.

⁷ *Peters v. Lincoln, &c. R. R. Co.*, 14 Fed. Rep. 319. But a party going into possession under a void lease or agreement for a lease becomes liable to pay a just compensation for the use of the road. *Farmers' Loan & Trust Co. v. St. Joseph, &c. R. R. Co.*, 2 Fed. Rep. 117. In an English case an Act of Parliament empowered one railway company to grant, and another company to accept, a lease of a railway upon such terms as should be agreed upon, provided that the power to lease should not arise until the board of trade

A lease made without authority, is *ultra vires* and void,¹ and is not rendered valid by the acceptance of rent by the lessor under it.² But the lessee and all persons claiming under him, who has had possession under the lease is estopped from denying its validity in an action to recover the rent.³ If a railway company attempts to lease its road without legal authority, it will be restrained at the suit of a stockholder.⁴

SEC. 490. *Effect of a Lease.*—Where a lease is executed without legislative authority, the lessor still remains liable for the *laches* and neglect of the lessee, and may be sued therefor the same as though it was itself operating the road;⁵ but where the statute authorizes the lease, the lessee assumes during the existence of the lease all the duties and obligations of the lessor; and from the time that it enters into possession of the road, becomes solely liable for all injuries resulting from its management,⁶ unless it is operating the road in the name of the lessor.⁷ Thus, it is liable for injuries to persons or animals injured by reason of the defective condition of its track,⁸ or through the mismanagement of its trains or the negligence of its employés,⁹ or from its failure or neglect to build or maintain proper fences, cattle-guards, etc.¹⁰ But it cannot be made liable for torts committed by the lessor before the lease became operative, nor for the *laches* of the lessor;¹¹ and the lessee cannot escape liability upon

had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised and applied for the purpose of their acts; and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting. It was held that no lease, or binding agreement for a lease, could be made before the certificate had been obtained. *Kent Coast Ry. Co. v. London, Chatham & Dover Ry. Co.*, L. R. 3 Ch. App. Cas. 656.

¹ *Thomas v. Railroad Co.*, 101 U. S. 71; *Comm'rs of Tippecanoe County v. Lafayette, &c. R. R. Co.*, 50 Ind. 85.

² *Ogdensburgh, &c. R. R. Co. v. Vt. & Canada R. R. Co.*, 4 Hun (N. Y.), 268.

³ *Woodruff v. Erie R. R. Co.*, 93 N. Y. 609.

⁴ *Pond v. Vt. Valley R. R. Co.*, 12 Blatchf. (U. S. C. C.) 280.

⁵ *Ante*, p. 1392.

⁶ *Wasmer v. Delaware, &c. R. R. Co.*,

80 N. Y. 312; *Mahoney v. Atlantic, &c. R. R. Co.*, 63 Ma. 68; *Philadelphia, &c. R. R. Co. v. Anderson*, 94 Penn. St. 351; *Hoff v. Minneapolis, &c. R. R. Co.*, 14 Fed. Rep. 558.

⁷ *Bower v. B. & S. R. R. Co.*, 42 Iowa, 546.

⁸ *Wasmer v. Delaware, &c. R. R. Co.*, *ante*.

⁹ *Peoria, &c. R. R. Co. v. Lane*, 83 Ill. 448; *Clement v. Canfield*, 28 Vt. 302; *Tracy v. Troy, &c. R. R. Co.*, 38 N. Y. 433; *Hall v. Brown*, 54 N. H. 495; *Davis v. Providence, &c. R. R. Co.*, 121 Mass. 134. Unless the statute provides that the lessor shall be liable therefor. *Quested v. Newburyport, &c. Horse R. R. Co.*, 127 Mass. 204.

¹⁰ *Stewart v. Chicago, &c. R. R. Co.*, 27 Iowa, 232; *Daconing v. Chicago, &c. R. R. Co.*, 43 Iowa, 96; *Clary v. Iowa, &c. R. R. Co.*, 37 Iowa, 342.

¹¹ *Pittsburgh, &c. R. R. Co. v. Kain*, 35 Ind. 291.

the ground that the lessor had no authority to make the lease.¹ If there is a joint occupation of the road by the lessor and the lessee the former is liable for the acts of the latter in the operation of its trains, upon the ground that the latter does not occupy the relation of lessee, but rather that of licensee and therefore that the company owning the road cannot absolve itself from liability for the negligent acts of the licensee.² The lessee of a railroad is subject to all the provisions of the lessor's charter, and during the existence of the lease is subject to all the duties and liabilities of the lessor under the charter, except such as may be said to be personal;³ and this is doubtless the rule where the lease is made under legislative authority, independent of any such statutory provision, but in several of the States, the statute expressly imposes this liability upon the lessee. For injuries resulting from the original faulty construction of the road, or the omission by the lessor of some duty in its construction, the lessee is not responsible; but for its own negligence in maintaining the road and its appendages, as cattle-guards, depot-buildings, fences, etc., it is liable.⁴

¹ *McClellan v. Manchester, &c. R. R. Co.*, 13 Gray (Mass.), 124; *Doolan v. Midland Ry. Co.*, L. R. 2 App. Cas. 792.

² *Nelson v. Vt. & Canada R. R. Co.*, 26 Vt. 717; *Abbott v. Johnstown, &c. R. R. Co.*, 80 N. Y. 27; *Illinois Central R. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Chicago, &c. R. R. Co. v. Whipple*, 22 Ill.

105; *Chicago, &c. R. R. Co. v. McCarthy*, 20 Ill. 385; *Ohio, &c. R. R. Co. v. Dunbar*, 20 Ill. 623; *Alexandria, &c. R. R. Co. v. Brown*, 17 Wall. (U. S.) 445.

³ *Chicago v. Evans*, 24 Ill. 52.

⁴ *St. Louis, &c. R. R. Co. v. Curl*, 28 Kan. 622; *Cook v. Milwaukee, &c. R. R. Co.*, 36 Wis. 45.

CHAPTER XXXII

LEGISLATIVE CONTROL.

SEC. 491. Limitations upon Legislative Power.	SEC. 494. Effect of Repeal.
492. Exclusive Rights.	495. Police Power of the State.
493. Reservation of Right to Amend or Repeal.	496. Regulation of Charges for Carriage of Freight or Passengers.

SEC. 491. *Limitations upon Legislative Power.*—The national Constitution imposes an effectual bar upon the power of State legislatures to pass any law which impairs the obligation of a contract, and, as charters of private corporations are universally held to be contracts, they come within the saving operation of this restriction.¹ A grant is a contract, and implies an obligation not to reassert the right granted. And a gift of franchises and powers, as distinguished from a gift of property, is within this rule. Whether there was any consideration for it, moving from the corporation to the grantor of the charter, is immaterial. If a consideration were necessary, it might be found in the implied stipulations on the part of the grantees, and in the acts of those who deal with them on the faith of it. And such grant is not incapable of being deemed a contract because the corporation has no existence when the grant is made.² No

¹ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Thorpe v. Rutland*, 27 Vt. 140; *Com. v. Eastern R. R. Co.*, 103 Mass. 254; *Delaware Tax Cases*, 18 Wall. (U. S.) 206; *State v. Noyes*, 4 Me. 189; *Stone v. Mississippi*, 101 U. S. 814; *Washington Bridge Co. v. State*, 18 Conn. 53; *Philadelphia, &c. R. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Erie, &c. R. R. Co. v. Carey*, 26 Penn. St. 287; *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. (Md.) 1; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; *Flint, &c. Plank-Road Co. v. Woodhull*, 25 Mich. 99; *St. Louis v. Manufacturers', &c. Bank*, 49 Mo. 574; *Hamilton v. Keith*, 5 Bush (Ky.), 458; *Farrington*

v. Tennessee, 95 U. S. 679; *Smead v. Indianapolis, &c. R. R. Co.*, 11 Ind. 104; *Alabama, &c. R. R. Co. v. Burkett*, 46 Ala. 569; *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 517.

² *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Piqua Branch of the State Bank of Ohio v. Knoop*, 16 How. (U. S.) 369; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.), 436; *Franklin Branch Bank v. Ohio*, 1 id. 474; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 371; *Boston & Lowell R. R. Co. v. Salem & Lowell, &c. R. R. Co.*, 2 Gray (Mass.), 1; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 23; *Derby*

distinction exists in this respect between the franchises and the administrative part of the charter. Unless a power is reserved for this purpose, the government cannot, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or change or control the administration of the property, or compel the corporation to receive a new charter.¹ But if the act of incorporation is a grant of political power, — as, if it creates a civil institution to be employed in the administration of the government, or if the funds of the corporation are public property, or the State, as a government, is alone interested in its transactions, — the legislature in such a case may freely modify its charter. But if it is a private institution endowed with a capacity to take property for objects unconnected with government, whose funds are invested by individuals on the faith of the charter, the charter is a contract which the legislature cannot impair without the consent of the corporation.² And according to the cases last cited the fact that the purpose of the corporation is an object of public or even national concern, does not render it a public corporation; nor does the fact of incorporation change its character in this respect, or give the legislature any power over it. The right to change civil institutions is not founded on their being incorporated, *but on their being the instruments of government created for its purposes*. The right to incorporate belongs to the legislative powers, but not to be exercised as in general legislation, to grant and repeal at pleasure. In one sense an act of incorporation of a private corporation is a law, in another it is a

Turnpike Co. v. Parks, 10 id. 522; Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co., 17 id. 40; Washington Bridge Co. v. Connecticut, 18 id. 53; Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35; Pingry v. Washburn, 1 Aik. (Vt.) 264; State v. Branin, 23 N. J. L. 484; Com. v. United States Bank, 2 Ashm. (Penn.) 349; Brown v. Hummel, 6 Penn. St. 86; State v. Commercial Bank of Cincinnati, 7 Ohio, 125; Michigan Bank v. Hastings, 1 Doug. (Mich.) 225; Smead v. Indianapolis, &c. R. R. Co., 11 Ind. 104; University of Maryland v. Williams, 9 G. & J. (Md.) 365; Young v. Harrison, 6 Ga. 180; Macon & Western R. R. v. Davis, 13 id. 68; City of Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642; Woodfork v. Union Bank, 3 Coldw. (Tenn.) 488; Nevill v.

Bank of Port Gibson, 15 Miss. 513; Gorman v. Pacific R. R., 26 Mo. 441; Wales v. Stetson, 2 Mass. 143; Thorpe v. Rutland, &c. R. R. Co., 27 Vt. 140; Seymour v. Hartford, 21 Conn. 486; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; Com. v. Cullen, 18 Penn. St. 133; State v. Dawson, 22 Ind. 272; Guillothe v. City of New Orleans, 12 La. An. 432. Contrary, see State v. Southern, &c. R. R. Co., 24 Tex. 80; Toledo Bank v. Bond, 1 Ohio St. 622; and Mechanics & Traders Bank v. Debolt, id. 591. The last case was reversed in the Supreme Court of the United States, 18 How. (U. S.) 380.

¹ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

² Allen v. McKeen, 1 Sumn. (U. S.) 276; Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642.

grant. As between the State and the corporators it is a grant of powers, which by the act pass out of the State and are vested in the corporation, and can only be forfeited by breach of condition. The persons who compose it cannot be disseised of their privileges except by the law of the land.¹ Where a single corporation is formed by charters granted by several States, for the purpose of constructing a public work, extending into both States, and contemplated as one continuous and entire highway, the charters become a compact between the States and the company, and the assent of all is necessary to give validity to a statute of either State infringing the powers of the corporation in either State.² From what has been said, it will be seen that unless the right to amend or repeal the charter is reserved therein, the legislature has no authority to impose any burdens upon a corporation created by it, which in any measure impair any of the obligations of the contract as evidenced by the charter; nor can it, after the rights of the corporation have vested under the charter, summarily repeal it.³ Such charters, although a law, are also contracts between the corporation and the State, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as though they were contracts between individuals.⁴ The rights of a corporation under a charter may be said to be vested, when it has accepted it, and organized under it, and performed such conditions precedent, if any, as are essential to give it corporate life. Where the legislature grants a charter to a railway company, with a provision that it may charge such rates for the transportation of freight and passengers as the directors may fix, it has no power to establish different rates, or to provide a different tribunal for the establishment of rates.⁵ So if the charter exempts the corporate property from taxation, it has no power to make it taxable;⁶ nor if it provides that it shall pay a certain specified sum in lieu of all other taxes, can it provide that it shall pay a different sum or in a different manner.⁷

¹ *State v. Heyward*, 3 Rich. (S. C.) L. 389.

² *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. (Md.) 140.

³ *Allen v. Buchanan*, 9 Phila. (Penn.) 283.

⁴ *Flint, &c. Plank-Road Co. v. Woodhull*, 25 Mich. 99.

⁵ *Hamilton v. Keith*, 5 Bush (Ky.), 458.

⁶ *Mobile, &c. R. R. Co. v. Mosely*, 52 Miss. 127; *Northwestern University v. People*, 99 U. S. 304.

⁷ *Farrington v. Tennessee*, 95 U. S. 679.

Nor can a turnpike company which is authorized to establish gates at such points as its directors might designate, be compelled to establish them at some other point,¹ or to allow certain persons to pass free.² A railroad company which has taken lands for its road and paid compensation therefor under the provisions of a statute, cannot by a subsequent statute be compelled to pay damages not contemplated by the original act;³ nor indeed can any restrictions or burdens be imposed upon a corporation by the legislature, which were not imposed or contemplated by the original grant,⁴ except such as come within the police power of the State,⁵ or within the reservations of the charter itself. Whatever property a corporation lawfully acquires is held under the same guarantees which protect the property of private persons from spoliation; and even where the power to amend, alter, or repeal its charter exists, the legislature cannot exercise a control over its property, except such as may be exercised through control over its franchise, and other like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.⁶

SEC. 492. **Exclusive Rights.**—The legislature may invest a railway or other corporation with an exclusive right, and when it has done so, and the right has vested in the corporation under the charter, it cannot repeal or impair it, either by a statute or by a change in the State constitution. Thus, in a case before the Circuit Court of the United States,⁷ the legislature of Louisiana in 1877 gave to a water-works company the exclusive right and privilege of supplying the city of New Orleans with water. In 1879 the constitution of the State was amended so as to proclaim the abolition of the monopoly features of the charters of corporations. It was held that this provision of the constitution impaired the obligation of the contract in the charter named, and therefore was unconstitutional.

¹ *Attorney-General v. Germantown, &c. Turnpike Co.*, 55 Penn. St. 466.

² *Pingry v. Washburn*, 1 Aik. (Vt.) 264.

³ *Towle v. Eastern R. R. Co.*, 18 N. H. 547; 17 id. 519.

⁴ *State v. Noyes*, 47 Me. 189; *People v. Jackson, &c. Plank-Road Co.*, 9 Mich. 285; *Bailey v. Philadelphia, &c. R. R. Co.*, 4 Harr. (Del.) 389; *Monongahela Navigation Co. v. Coon*, 6 Penn. St. 379; *Ireland v. Palestine, &c. T. Co.*, 19 Ohio St. 369; *New Orleans, &c. R. R. Co. v.*

Harris, 27 Miss. 517; *Miller v. State*, 15 Wall. (U. S.) 478; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571; *University v. North Carolina R. R. Co.*, 76 N. C. 103; *Sage v. Dollard*, 15 B. Mon. (Ky.) 340.

⁵ *Cane v. Intoxicating Liquors*, 115 Mass. 153.

⁶ FIELD, J., in *County of San Mateo v. Southern Pacific R. R. Co.*, 13 Fed. Rep. —.

⁷ *New Orleans Water Works Co. v. St. Tammany Water Works Co.*, 14 Fed. Rep. 194.

It is competent for the legislature creating a corporation for the purpose of constructing roads or other public works and improvements, to grant, without reservation of a power to repeal, an exclusive right, and to stipulate that the State shall not subsequently make any other grant inconsistent with such exclusive right. It is true that for general purposes of legislation, the legislature has full power to repeal former laws, and, of course, the last legislative act is binding, and necessarily repeals all prior acts which are repugnant thereto. But in addition to the law-making power, the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises for purposes necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests; and of the necessity and convenience of such improvements, of their fitness and the best modes of providing them, the established government of the State, acting by the legislature for the time being, must necessarily judge and determine. In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature, and a just estimate of the public benefit to be procured, and the cost at which it is to be obtained; and, as great changes in the state of things may take place in the progress of time, a great increase of travel, for instance, on a given line, which changes cannot be specifically foreseen, it is the part of wisdom to provide for this. But when such a contract has been made on considerations of an equivalent public benefit, and when the grantees have advanced their money to the public upon the faith of it, the State is bound, by the plain principles of justice, faithfully to respect all grants and rights thus created and vested by the contract. Such a power of regulating public rights is everywhere recognized as one distinguishable from that of legislation, a power incident and necessary to all well-regulated governments, and when rightly exercised is within the constitutional power of the legislature and binding upon the government and people.¹

Thus the act incorporating the Boston & Lowell Railroad corporation, which was one of the earliest railroad charters granted, provided that no other railroad than the one granted should, within thirty years from and after the passing of this act, be authorized to be made, leading from Boston, Charlestown, or Cambridge to Lowell, the legislature also reserving in the act the right to regulate the

¹ *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40.

tolls to a certain extent, and to purchase the franchise upon certain terms. It was held that this provision, contained as it was in the charter as an inseparable part of it, constituted a contract by the commonwealth with the corporation that no other such railroad should be lawfully made for thirty years. He who has the power of conferring a right or a franchise lying solely in grant, and who stipulates for a valuable consideration that another shall have and enjoy it undisturbed and unmolested by any act or permission of his, in effect grants such right or franchise. But, more especially, when such right is conferred by the community in the form of a statute having all the forms of law, and is sanctioned by the government acting in behalf of all the people, and having power to bind them by law, such right would seem to be clothed with as much solemnity, and to have the same effect and force, as if it were the grant of an exclusive right in terms.

Granting to several other railroad corporations the right to establish, by means of junctions with each other, a continuous line of transportation by railway from Lowell to Boston, was held to be beyond the power of the legislature, such a connection being justly deemed to be making a railway within the meaning of the plaintiff's charter, and such an infringement as to be a nuisance to their rights.¹

But unless the grant is made exclusive in express terms, the legislature is not presumed to have intended to bind itself not to authorize similar enterprises which may seriously interfere with a previous grant, or even destroy it. This principle has been acted upon in numerous cases, and is so well settled as not to admit of doubt or discussion.² An exclusive grant may be made out, however, by reference to some other act of the legislature which imports a contract, or by the prohibition of similar enterprises, either in the charter

¹ *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray (Mass.), 1. 590; *Bartram v. Central T. Co.*, 25 Cal. 283; *Thompson v. N. Y. & Hudson River R. R. Co.*, 3 Sandf. (N. Y.) Ch. 625;

² *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 419; *Newcastle, &c. R. R. Co. v. Penn., &c. R. R. Co.*, 3 Ind. 464; *Collins v. Sherman*, 31 Miss. 679; *Shorter v. Smith*, 9 Ga. 517; *Indian Cañon Road Co. v. Robinson*, 13 Cal. 519; *Fall v. Sutter County*, 21 Cal. 237; *Baltimore, &c. R. R. Co. v. State*, 45 Md. 596; *Fitch v. New Haven, &c. R. R. Co.*, 30 Conn. 38; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *White River T. Co. v. Vt. Central R. R. Co.*, 21 Vt. 590; *Bartram v. Central T. Co.*, 25 Cal. 283; *Thompson v. N. Y. & Hudson River R. R. Co.*, 3 Sandf. (N. Y.) Ch. 625; *in re Hamilton Avenue*, 14 Barb. (N. Y.) 405; *Oswego Falls Bridge v. Fish*, 1 Barb. Ch. (N. Y.) 547; *Cambias v. Phila., &c. R. R. Co.*, 4 Brewst. (Penn.) 563; *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71; *Delaware, &c. Canal Co. v. Camden, &c. R. R. Co.*, 14 N. J. Eq. 321; 16 id. 546; *State v. Noyes*, 47 Me. 189; *Pontchartrain R. R. Co. v. New Orleans Nav. Co.*, 15 La. An. 504.

itself or the general law.¹ But these exclusive grants, being in derogation of public rights, are strictly construed, and will not be extended to include any other than similar enterprises. The rule of construction as applied to charters of private corporations is that, in so far as they confer privileges or powers upon corporations, they must be strictly construed. Ambiguities and uncertainties in the expressions used must operate against the corporation, and only those privileges which are clearly conferred can be claimed.²

If the language of a statute provision conferring privileges upon a corporation is ambiguous or inconsistent with itself, a construction which favors the public convenience and trade, and abridges the grant, is to have preference over one which favors the company.³ Under this rule privileges granted in a charter of a corporation will not be deemed exclusive, so as to render unconstitutional a subsequent charter of another company, conferring similar privileges, unless it clearly appears in the charter of the first that the grant made to it was exclusive, and that it was intended to preclude the State from subsequently granting similar privileges to any other.⁴ So it is held that an exclusive grant to a railroad company of

¹ *Micon v. Tallussee Bridge*, 47 Ala. 652; *Binghamton Bridge Co., in re.*, 27 N. Y. 87; 3 Wall. (U. S.) 51; *Bridge Co. v. Hoboken Co.*, 13 N. J. Eq. 81; 1 Wall. (U. S.) 116.

² *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 419; *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71; *Rice v. Railroad Co.*, 1 Black (U. S.), 358; *Jefferson Branch Bank v. Skelly*, 1 id. 436; *Wales v. Statson*, 2 Mass. 146; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. (N. Y.) 547; *Shorter v. Smith*, 9 Ga. 517; *Macon & Western Railroad v. Davis*, 13 Ga. 68; *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *State v. Chase*, 5 Ohio St. 528; *Com. v. Central Passenger R. R.*, 52 Penn. 506; *Collins v. Sherman*, 31 Miss. 679; *Scales v. Pickering*, 4 Bingham. 448.

³ *Stormfeltz v. Manor Turnpike Co.*, 13 Penn. St. 555; *McLeod v. Burroughs*, 9 Ga. 213; *Justices, &c. v. Griffin & West Point Plank Road Co.*, 9 id. 475; *Stourbridge Canal Co. v. Wheeley*, 3 B. & Ad. 792; *Parker v. Great Western Railway Co.*, 7 M. & G. 253.

⁴ *Collins v. Sherman*, 31 Miss. 679.

The provisions of a statute authorizing companies to levy any charge upon the public, must be construed strictly. *Stockton & Darlington Railway Co. v. Barrett*, 11 C. & F. 590; *Heddy v. Wheelhouse*, Cro. Eliz. 558. The right to take tolls, freight, and fares can only be exercised by corporations under an express grant in their charters, and can never be raised by implication; charters conferring this right will always be construed most favorably to the public. *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. L. 623. Words intended to limit the powers of the corporation cannot be construed to describe, and so to limit, the rights of the public. *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172. As a rule, corporate powers cannot be created by implication, nor extended by construction, and no privilege is granted unless it is expressed in plain and unequivocal words. *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St. 9; *Wright v. Briggs*, 2 Hill (N. Y.), 77; *Mayor, &c. of Bacon v. Macon & Western R. R. Co.*, 7 Ga. 221.

the right to carry passengers is not infringed by a grant to another company to build a railroad for carrying freight,¹ and that the grant of an exclusive right to build a railroad for carrying freight and passengers by steam is not infringed by a grant to another company to build a railroad for carrying passengers by horsepower;² nor is a grant the evident purpose of which is to protect *through* traffic, infringed by the grant of railroads which only compete between intermediate points.³ The same principle has been applied to other corporations,⁴ and it may be said that the tendency of the courts is in the direction of a liberal exercise of the police power of the State for the regulation and control of railway and other corporations, even though the grant is exclusive,⁵ and new burdens and restrictions are thereby imposed.

SEC. 493. Reservation of Right to Amend or Repeal. — The legislature may reserve the right to alter, amend, or repeal a charter, by a provision either in the charter itself or in the general law; and when such power is reserved it may make any reasonable amendments, or impose upon the corporation any additional burdens, duties, or liabilities which are reasonable, which do not destroy or impair any of the vested rights of the corporation. But it cannot under such a reservation make amendments which take away its property without just compensation, or defeat the essential rights which were granted to it under its charter. Thus, a State statute providing that no plank-road company organized under a general act mentioned, to which the statute was an amendment, should maintain a toll-gate within the corporate limits of a city or village without the consent of the local authorities, or collect toll for any portion of its road within such limits in which a pavement was maintained by the municipality, it was held invalid where the effect of its enforcement would be to deprive a company of the right to take toll on two and a half miles of its road; and the fact that the general act contained a provision authorizing the legislature to amend, repeal, or alter such act, would not affect the result. Said COOLEY, J.:

¹ *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 77.

² *Louisville, &c. R. R. Co. v. Louisville City R. R. Co.*, 2 Duv. (Ky.) 175.

³ *Pontchartrain R. R. Co. v. New Orleans, &c. R. R. Co.*, 11 La. An. 253.

⁴ *Lake v. Virginia, &c. T. R. Co.*, 7 Nev. 294; *Mohawk Bridge v. Utica, &c. R. R. Co.*, 6 Paige, Ch. (N. Y.) 554;

New York v. New England Transfer Co., 14 Blatchf. (U. S. C. C.) 159; *McLeod v. Savannah, &c. R. R. Co.*, 25 Ga. 445.

⁵ *Boston, &c. R. R. Co. v. State*, 32 N. H. 215; *State v. Noyes*, 47 Me. 189; *Indianapolis, &c. R. R. Co. v. Kercheval*, 16 Ind. 84; *Bulkley v. New York, &c. R. R. Co.*, 27 Conn. 479.

"There is no well-considered case in which it has been held that a legislature, under the power to amend a charter, might take from the corporation any of its substantial property or property rights.¹ In the New York case last cited it was decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with provision for compensation. The decision was in accordance with a Massachusetts case² in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' The same doctrine is clearly asserted and affirmed in the United States Supreme Court,³ and is assumed to be unquestionable in the several opinions delivered in a previous case in that court.⁴ But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, — whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the law of the land." Even municipal corporations, though their charters are in no sense contracts,

¹ *Detroit v. Detroit & Howell's Plank-Road Co.*, 43 Mich. 146; *Albany, &c. R. R. Co. v. Brownell*, 24 N. Y. 345.

² *Com. v. Essex Co.*, 13 Gray (Mass.), 239, 253.

³ *Railroad Co. v. Maine*, 96 U. S. 499.

⁴ *Sinking Fund Cases*, 99 U. S. 700.

are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it.¹

Subject to some extent to an exception in favor of the right of the State to amend the charter of a private corporation, under an express reservation of authority to do so, or in the exercise of its police power, the rule is that the amendment of such charters, to become binding and effectual, must be accepted on the part of the corporators. Alterations in such charters which are not fundamental, and are authorized by the legislature, may be effectually accepted by a majority of the stockholders; that is to say, by a majority *per capita* when the right to vote is *per capita*, and by a majority of stock where each share of the stock is entitled to one vote. *Alterations which change the nature and purposes of the corporation, or of the enterprise for which it was created, are fundamental, while those which work no material change are not fundamental.*² The principle upon which these cases go is that alterations, or as they are sometimes called, amendments, which do not change the nature, purpose, or character of a corporation or its enterprise, but which are designed to enable the corporation to conduct its authorized business with greater facility, more beneficially or more wisely, are auxiliary to the original object; and that therefore when one becomes a stockholder he impliedly assents that such alteration or general amendment may be made.³ "We may add what appears to be an obvious consideration, that if no alteration or amendment of a corporate charter can be made, even in matters of administrative detail, or as to the means and agencies through which the corporate enterprise shall be carried on, except with the consent of every stockholder, the

¹ Terrett v. Taylor, 9 Cranch (U. S.), 43; Pawlet v. Clark, 9 id. 292; State v. Haben, 22 Wis. 660; People v. Common Council, 28 Mich. 228.

² BERRY, J., in Mower v. Staples, Minnesota Sup. Ct., July, 1884; H. & N. H. R. R. Co. v. Croswell, 5 Hill (N. Y.), 383; Stevens v. R. & B. R. R. Co. 29 Vt. 546; Curry v. Scott, 54 Penn. St. 270; K. R. & R. I. R. R. Co. v. Marsh, 17 Wis. 13; Nugent v. Sup'rs, 19 Wall. (U. S.) 241; Everhart v. W. C. & P. R. R. Co., 28 Penn. St. 339; N. H. & D. R. R. Co. v. Chapman, 38 Conn. 56; Joy v. J. & M. Plank-Road Co., 11 Mich. 156; Clearwater v. Meredith, 1 Wall. (U. S.) 25; Union Locks & Canals v.

Towne, 1 N. H. 44; Martin v. Railroad Co., 8 Fla. 382; Witter v. M. O. & R. R. Co., 20 Ark. 463; Hester v. M. & C. R. R. Co., 32 Miss. 378; Winter v. Muscogee R. R. Co., 11 Ga. 438; Hoey v. Henderson, 32 La. An. 1069; Banet v. Alton & S. R. R. Co., 13 Ill. 504; Zabriskie v. H. & N. Y. R. R. Co., 18 N. J. Eq. 178; Mowrey v. I. & C. R. R. Co., 4 Biss. (U. S. C. C.) 78; Field Corp. §§ 81, 388.

³ Stevens v. R. R. Co., *ante*; N. H. & D. R. R. Co. v. Chapman, *ante*; Banet v. A. & S. R. R. Co., *ante*; H. & N. H. R. R. Co. v. Croswell, *ante*; Kenosha R. R. Co. v. Marsh, *ante*; Joy v. J. & M. Plank-Road Co., *ante*.

result would be not only great public and private inconvenience, but in many cases a complete practical failure of the enterprise itself. Certainly this is not in accordance with the understanding or the practice of the courts, of the profession, or of those who have been engaged in carrying on our great corporate undertakings."¹

In the Minnesota case referred to the alteration proposed was to increase the number of directors from five to nine, and it was held not to be fundamental within the definition given and sanctioned by the authorities. Said BERRY, J.: "It in no way changes the nature or purpose of the boom company, or of the enterprise for which it was created. It is a change respecting *modus operandi* merely, — a change, not of the nature or purpose or character of the company, or of the company's enterprise, but a change of the instrumentalities and agency — the machinery by which that purpose is to be effected and that enterprise carried on."²

It may be said that the rule is well established that a reserved power to amend, alter, or repeal a charter, authorizes the legislature, in general, to make any alteration which does not defeat or substantially impair the object of the grant, or rights which may have vested under it, and which the legislature may deem necessary either to promote the corporate purpose, or to secure other public or private rights. Thus, where a manufacturing company was created, with authority to construct a dam on paying damages to the owners of fishing rights above, and its charter contained no express exemption from obligation to construct a way for fish to pass the dam, but was subject to a general power reserved to amend or alter, it was held that the legislature might impose upon the corporation the duty of constructing a fish-way in the dam, satisfactory to commissioners appointed for the purpose.³

So it may alter and regulate the fares charged by a railroad company formed by consolidation of companies,⁴ or may authorize the company to reduce the capital, on consent of a certain majority of the stockholders;⁵ or may impose a tax on the capital stock of the company, notwithstanding a supplemental act that the "capital stock

¹ BERRY, J., in the Minnesota case cited *ante*.

² In *Everhart v. W. C. & P. R. R. Co.*, *ante*, an amendment providing for the election of three additional managers, that is, directors, was upheld. In *N. H. & D. R.R. Co. v. Chapman*, *ante*, an amendment authorizing two of the directors to be ap-

pointed by the city of New Haven, a subscriber for stock, was held not to violate the contract.

³ *Commissioners on Inland Fisheries v. Holyoke Water-Power Co.*, 104 Mass. 446.

⁴ *Shields v. State*, 26 Ohio St. 86.

⁵ *Joslyn v. Pacific Mail Steamship Co.*, 12 Abb. Pr. (N. Y.) n. s. 329.

and dividends" of that kind of corporations should not be taxable;¹ or require a railroad company to maintain fences along their roads where running within the limits of highways;² and make it liable for cattle injured by its trains by reason of its omission to maintain cattle-guards,³ or to lower the grade of its road so as to cross highways or other railroads at grade,⁴ or to discontinue the use of steam power in cities;⁵ or compel connection with another railroad,⁶ or compel it to establish stations and stop its trains at them;⁷ or indeed may impose any duty, burden, or liability upon a railway corporation which does not operate a fundamental change in the charter rights of the corporation; and this power may exist under a provision of the general laws in force when the charter was granted, although no reference to such general law is made in the charter;⁸ and such reservation has the same force as a special reservation in the charter.⁹

While, under a reservation of authority to alter, amend, or repeal a charter, the charter may be repealed at the pleasure of the legislature, yet its charter cannot be modified without the consent of the corporation; but if it refuses to accept the statutory modification it must cease to transact business in a corporate capacity, or it will be treated as having accepted it, and will be bound thereby.¹⁰ If the right to repeal the charter is made conditional upon the fact of some misuse or abuse of the franchises, it cannot be repealed except after some inquiry has been instituted to ascertain the facts, and the corporation has had an opportunity to be heard in its defence.¹¹ Where there is any doubt as to the acceptance of an amendment to the charter by a corporation, where acceptance is necessary, the court may direct a stock vote to be taken.¹² Where the charter provides

¹ Union Improvement Co. v. Commonwealth, 69 Penn. St. 140.

² Durand v. New Haven &c. R. R. Co., 42 Conn. 211.

³ Jeffersonville R. R. Co. v. Gabbert, 25 Ind. 431.

⁴ People v. Boston & Albany R. R. Co., 70 N. Y. 569; White v. Quincy, 97 Mass. 430; Roxbury v. Boston, &c. R. R. Co., 6 Cush. (Mass.) 424; Bangor, &c. R. R. Co. v. Smith, 47 Me. 34; Pittsburgh, &c. R. R. Co. v. Southwest Penn. R. R. Co., 77 Penn. St. 173.

⁵ Buffalo, &c. R. R. Co. v. Buffalo, 5 Hill (N. Y.), 209.

⁶ Fitchburg R. R. Co. v. Grand Junction R. R. Co., 4 Allen (Mass.), 198.

⁷ Com. v. Eastern R. R. Co., 103 Mass. 254.

⁸ State v. Person, 32 N. J. L. 134; Tomlinson v. Branch, 15 Wall. (U. S.) 460; Holyoke Co. v. Lyman, 15 id. 500; Tomlinson v. Jessup, 15 id. 454; State v. Com'rs of Railroad Taxation, 37 N. J. L. 228.

⁹ Griffin v. Kentucky Ins. Co., 3 Bush (Ky.), 592.

¹⁰ Yeaton v. Bank of the Old Dominion, 21 Gratt. (Va.) 593.

¹¹ Mayor, &c. of Baltimore v. Pittsburgh, &c. R. R. Co., 1 Abb. (U. S.) 9.

¹² Matter of Mercantile Library Co., 2 Brews. (Penn.) 447.

that it shall not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions" of the charter, the question of violation is a judicial question, and the charter cannot be repealed until the violation has been made to appear to the legislature by some proper judicial proceeding. Where, therefore, the legislature passed an act, not purporting to be based upon any such finding, but simply providing that the charter "be and the same is hereby repealed," it was held that if such act could be regarded as a legislative determination that a violation of the charter had taken place, it would nevertheless be void, as an attempt at the exercise by the legislature of judicial power. Such an act could not be sustained, subject to a right in the corporators to have the question of violation tried in the courts afterward. There can be no appeal to the courts from the conclusions of the legislature in matters within its jurisdiction and the fact, if valid for any purpose, must be conclusive. But the legislature cannot pass finally upon questions of private right.¹

The question whether an amendment of a charter is material or not is purely one of law for the court, and should not be submitted to the jury.²

SEC. 494. Effect of Repeal. — When the charter of a corporation is repealed under a power reserved therein, the effect is that the statute under which the corporation was created no longer exists; and whatever force the law may give to transactions entered into and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights. The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract, and choses in action, are not destroyed by such repeal; and if the legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power. If the repeal of the old corporation was within the power of the legislature, it could charter a new one, and confer the same powers on it as the former had possessed, and so far as the property or franchises of the

¹ *Flint, &c. Plank-Road Co. v. Woodhull*, 25 Mich. 99.

² *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240.

old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor. A statute which under this power repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States, if it provides for compensation for the property of the extinct corporation so taken by the new one.¹

SEC. 495. Police Power of the State. — Whether there is any reservation of a right to alter, amend, or repeal, in the charter of a corporation, there is no question but that the corporation is nevertheless subject to such laws as the legislature may enact for the safety of the lives, the preservation of the health, safety, and good order of the community, which do not directly conflict with a right granted by the charter. The corporation, because invested with certain special powers and privileges, is not thereby put outside of legislative control, or beyond its regulatory power, as to matters not affecting its essential franchises, or which do not deprive it of its property in a manner in which the State has contracted not to deprive it, even though the value of such franchises, by reason of such laws, is lessened. This power is an essential attribute of sovereignty, and is exercised under the general police power of the State, of which it would be idle to presume it ever intended to divest itself;² and corporations, as well as individuals are amenable thereto, and the one is as much subject thereto as the other. In a leading case under this head,³ REDFIELD, C. J., said: "The power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature, — which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot, therefore, be violated, so as to deprive the legislature of the power, even by express grant to any mere public

¹ *Greenwood v. Union Freight R. R. Co.*, U. S. Sup. Court, 1882. 153; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Chicago, &c. R. R. Co. v. Fuller*, 17

² *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *Richmond, &c. R. R. Co. v. Richmond*, 26 Gratt. (Va.) 83; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *Stone v. Mississippi*, 101 U. S. 814; *Beer Co. v. Massachusetts*, 97 U. S. 25; 115 Mass. 153; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Chicago, &c. R. R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *Coates v. New York*, 7 Cow. (N. Y.) 585; *Com. v. Alger*, 7 Cush. (Mass.) 53; *Watertown v. Mayo*, 109 Mass. 315.

³ *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140.

or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railways, to be carried into effect by their by-laws and other regulations, it is of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would.

“This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim *sic utere tuo ut alienum non lædas*, which is universal in application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railways are concerned, this police power, which resides primarily and ultimately in the legislature, is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, — and in all doubtful cases their judgment is final, — require the several railways in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.¹ There would be no end of

¹ *Lake Shore, &c. R. R. Co. v. Cincinnati, &c. R. R. Co.*, 30 Ohio St. 604; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; *Kansas Pacific R. R. Co. v. Columbus Gas-light Co.*, 34 Ohio St. 472; *Ruggles v. People*, 91 Ill. 256; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; *Kansas Pacific R. R. Co. v. Mower*, 16 Kan. 573; *Boston, &c. R. R. Co. v. State*, 32 N. H. 215; *Frank-*

illustrations upon this subject, which in the detail, are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axle-trees, the number of brake-men upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and many similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be.¹

"There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question.

"All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College v. Woodward* was decided, and which every well-considered case upon the subject in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railways, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country." But, even this power is subject to constitutional limitations, and must have reference to the comfort, safety, and welfare of society, and, as applied to corporations, must not conflict with their charters; and the legislature has no power, under the pretence of police regulations, to divest it of any of its essential rights or privileges.² Thus an amendment of the charter of a railroad company which repeals a provision of the original charter allowing the company to charge such rates of freight as should be fixed by the directors, and establishes a tariff of way freights, is un-

fort, &c. *R. R. Co. v. Philadelphia*, 58 Penn. St. 119; *People v. Boston & Albany R. R. Co.*, 70 N. Y. 569; *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261.

¹ *Hegeman v. Western R. R. Co.*, 16 Barb. (N. Y.) 353.

² *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.

constitutional, if no right of amendment was reserved in the original charter, or by any general statute existing at the time of the incorporation.¹ So where the charter of a bank authorized it to construct water-works for a certain city, and declared that after the expiration of a specified time it should be lawful for the city to purchase such water-works on terms prescribed, and pay for them in bonds of the city; and the bank was required to sell the works on the prescribed terms, upon the election of the city to purchase,—it was held that this charter constituted a contract with the bank; and an act of the legislature, passed after the expiration of the time specified, and after the election by the city to purchase the works, which imposed onerous conditions upon the issue of bonds by the city, so far as such act was applicable to bonds to be issued to the bank in payment for the water-works, impaired the obligation of the contract with the bank, and was therefore void.² But while rights which are vested by the charter of a private corporation in the corporators and stockholders cannot be impaired by subsequent legislation, yet a charter may be amended in so far as is necessary to carry into effect or accomplish the purposes for which it was obtained.³ Legislative control of the use of property of a corporation is not lost by an omission to reserve power to repeal or amend its charter. Thus the prohibition of the sale of malt liquors, being in the nature of a police regulation, does not impair the obligation of the contract contained in the charter of any brewery corporation created before the passage of that statute, and which is by its charter authorized to manufacture malt liquors; although no power to alter, modify, or repeal such charter is therein reserved.⁴ So a statute prohibiting the employment of all persons under the age of eighteen, and of all women, in laboring in any manufacturing establishment more than sixty hours per week violates no contract implied in the granting of a charter to a manufacturing company, nor any right reserved under the constitution to any individual citizen; and may be maintained as a health or police regulation.⁵ A statute providing a different mode for the service of process upon a railway corporation from that prescribed in the charter is held not to impair the obligation of the contract in the charter.⁶ And the same doc-

¹ *Hamilton v. Keith*, 5 Bush (Ky.), 458.

² *Sala v. New Orleans*, 2 Woods (U. S. C. C.), 188.

³ *Covington v. Covington, &c. Bridge Co.*, 10 Bush (Ky.), 69.

⁴ *Com. v. Intoxicating Liquors*, 115 Mass. 158.

⁵ *Com. v. Hamilton Manuf. Co.*, 120 Mass. 383.

⁶ *Railroad Co. v. Hecht*, 95 U. S. 168.

trine has been applied to laws making it liable as a common carrier in spite of special contracts ;¹ limiting the right to sell tickets to agents ;² making it liable for the wages of the employés of a contractor ;³ and for double the value of cattle killed by it in certain cases ;⁴ requiring the bell to be rung or whistle sounded at certain points,⁵ notice of rules to be posted,⁶ or trains to be stopped at stations for a certain time.⁷

It is unnecessary to more fully specify the instances in which the State may bind this class of corporations by legislation, as from what has been said it will be seen that the true test as to whether a statute in a given case can be enforced against them or not, depends upon the circumstance whether it infringes any of the essential rights expressly conferred by their charters, or deprives them of their property without just compensation. If not, the law can be enforced ;⁸ but if it does impair any of the express or contractual provisions of the charter, it is unconstitutional and void.⁹ So also in some of the States the courts have refused to uphold statutes which relate to the public *convenience* merely, and are not essential for safety, or which impose additional burdens upon these corporations, of mere private interest, which are not essential either to the safety or convenience of the public.¹⁰ But the tendency of the courts is

¹ *Mobile, &c. R. R. Co. v. Franks*, 41 Miss. 494.

² *Foy v. State*, 63 Ind. 552.

³ *Hart v. Boston, &c. R. R. Co.*, 121 Mass. 510 ; *Brown v. Com. & Passumpsic River R. R. Co.*, 31 Vt. 214.

⁴ *Little Rock, &c. R. R. Co. v. Payne*, 33 Ark. 316 ; *Jones v. Galena, &c. R. R. Co.*, 16 Iowa, 6 ; *Cairo, &c. R. R. Co. v. People*, 92 Ill. 97 ; *Tredway v. Sioux City, &c. R. R. Co.*, 43 Iowa, 527.

⁵ *Pittsburgh, &c. R. R. Co. v. Brown*, 67 Ind. 45 ; *Western Union R. R. Co. v. Fulton*, 64 Ill. 271.

⁶ *Chicago, &c. R. R. Co. v. Fuller*, 17 Wall. (U. S.) 860.

⁷ *Davison v. State*, 4 Tex. App. 545.

⁸ *Gillam v. Sioux City, &c. R. R. Co.*, 9 Rep. 375 ; *Nelson v. Vt. & Canada R. R. Co.*, 26 Vt. 717 ; *Snydam v. Moore*, 8 Barb. (N. Y.) 358 ; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441 ; *Jones v. Galena, &c. R. R. Co.*, 16 Iowa, 6 ; *New Albany, &c. R. R. Co. v. Tilton*, 12 Ind. 3 ; *Norris v. Androsoggin R. R. Co.*, 39 Me. 393 ; *Penn. R. R. Co. v. Riblet*, 66 Penn. St.

164 ; *Union R. R. Co. v. Cambridge*, 11 Allen (Mass.), 287 ; *Vazie v. Mayo*, 45 Me. 560 ; *Lake Shore, &c. R. R. Co. v. Cincinnati, &c. R. R. Co.*, 30 Ohio, 604 ; *Toledo, &c. R. R. Co. v. Jacksonville*, 67 Ill. 37 ; *State v. Southern Pacific R. R. Co.*, 24 Tex. 80 ; *Whitson v. Franklin*, 34 Ind. 392 ; *Tuice v. Hannibal, &c. R. R. Co.*, 49 Mo. 438 ; *Ditberner v. Chicago, &c. R. R. Co.*, 47 Wis. 138 ; *Peters v. St. Louis, &c. R. R. Co.*, 23 Mo. 107 ; *Kent v. N. Y. Central R. R. Co.*, 12 N. Y. 628 ; *Pratt v. Atlantic, &c. R. R. Co.*, 46 Me. 65.

⁹ *Phila, &c. R. R. Co. v. Bowers*, 4 Houst. (Del.) 506 ; *Com. v. Penn. Canal Co.*, 66 Penn. St. 41 ; *Illinois Central R. R. Co. v. Bloomington*, 76 Ill. 447 ; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339 ; *State v. Noyes*, 47 Me. 189 ; *Com. v. Portland, &c. R. R. Co.*, 63 Me. 289.

¹⁰ *Nelson v. Vt. & Canada R. R. Co.*, *ante* ; *Tombs v. Rochester, &c. R. R. Co.*, 18 Barb. (N. Y.) 583 ; *Underhill v. N. Y. & Hudson R. R. Co.*, 21 Barb. (N. Y.)

towards a liberal exercise of the police power of the State over these corporations in all matters where it might be exercised over natural persons.¹

SEC. 496. Regulation of Charges for Carriage of Freight and Passengers.—Where the right of amendment or repeal is not reserved, and the charter provides that the rates to be charged for the carriage of freight or the carriage of passengers may be fixed in a certain way, as, by the board of directors, the legislature has no power to provide a different mode for fixing such rates, or even to fix them itself.² But it seems to be now quite well settled that, where the legislature is not restrained by any contract between the State and the corporation, it may limit and regulate such rates in any manner it sees fit, — whether the rates fixed by it are reasonable or not.³ In some of the States it is held, however, that the legislature can only interfere with the rates charged for transportation by these companies where the provisions of the act are reasonable, and that the question as to whether they are reasonable or not is judicial, to be determined by the courts.⁴ It may be said, however, that the tendency of the courts is to support full and unrestricted legislative control in this respect. If, however, the legislature should attempt to compel these companies to carry freight and passengers *free of charge*, the courts would doubtless treat the law as unconstitutional. The right to compensation for transportation is one of the essential rights conferred by the charter, and while the legislature may limit the amount to be taken, it cannot compel the company to carry either freight or passengers free.⁵ If a railway company is authorized to fix “reasonable” rates for the carriage of freight and passengers, it is for the court and jury to say whether the rates fixed by it are reasonable or not⁶; and the legislature may, in such a case, fix a max-

489; *Erie v. Erie Canal Co.*, 59 Penn. St. 174; *Ill. Central R. R. Co. v. Bloomington*, 76 Ill. 447.

¹ *Munn v. Illinois*, 94 U. S. 113.

² *Hamilton v. Keith*, Bush (Ky.), —.

³ *Munn v. Illinois*, 94 U. S. 113; *Stone v. Wisconsin*, 94 id. 181; *Chicago, &c. R. R. Co. v. Iowa*, 94 id. 155; *Chicago, &c. R. R. Co. v. Arkley*, 94 id. 179; *Winona, &c. R. R. Co. v. Blake*, 94 id. 180; *Union Pacific R. R. Co. v. United States*, 99 U. S. 700; *Ill. Central R. R. Co. v. People*, 95 Ill. 313; *Attorney-General v. Railroad Companies*, 35 Wis.

425; *Cincinnati, &c. R. R. Co. v. Cole*, 29 Ohio St. 126; *Mobile, &c. R. R. Co. v. Steiner*, 61 Ala. 557; *State v. Winona, &c. R. R. Co.*, 19 Minn. 434.

⁴ *Sloan v. Pacific R. R. Co.*, 61 Mo. 64; *Philadelphia, &c. R. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Chicago, &c. R. R. Co. v. People*, 67 Ill. 11.

⁵ *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205; *Boyle v. Phila., &c. R. R. Co.*, 54 Penn. St. 310.

⁶ *Campbell v. Marietta, &c. R. R. Co.*, 23 Ohio St. 168; *Smith v. Pittsburgh, &c. R. R. Co.*, 23 id. 10.

imum rate of charge for transportation over the road.¹ If the charter or general law fixes the maximum rates of charge for a definite number of miles, and the company is left to fix reasonable rates for less distances, it is held that the company has no authority to fix rates for such shorter distance which exceed the maximum allowed for the longer distance.² The legislature may, in the absence of any limitation upon its authority in that respect contained in the charter, compel these companies to carry freights and passengers at uniform rates, and without discrimination as to trains; but in the absence of any statute to that effect, they are at liberty to discriminate in rates both as to trains and the distance to be travelled,³ and between passengers purchasing tickets and those paying upon the cars; but they cannot discriminate as to persons.⁴ Contracts may be made with shippers, in the absence of any statute prohibiting, to refund by way of rebate or drawbacks a certain portion of the regular tariff rate; but the agreement is not valid if it is also accompanied by the further agreement that such rebates shall not be allowed to others.⁵ But it is within the power of the legislature to prevent the allowance of rebates and drawbacks; and such legislative interference is not of doubtful utility, as under this pretence very unjust discriminations are often made. Where the directors of the company are permitted by law to fix the rates of charge, it is not essential that they should do so by a resolution of the board. It is sufficient if certain established rates are adopted by the company; and the company is bound by such rates, whether established by the directors or other officers or agents of the company.⁶

¹ Peik v. Chicago, &c. R. R. Co., 94 U. S. 164.

² Smith v. Pittsburgh, &c. R. R. Co., *ante*.

³ Penn. R. R. Co. v. Sly, *ante*; State v. Overton, 24 N. J. L. 435.

⁴ Indianapolis, &c. R. R. Co. v. Binard, 46 Ind. 293.

⁵ Stewart v. Lehigh Valley R. R. Co., 38 N. J. L. 505.

⁶ Jeffersonville, &c. R. R. Co. v. Rogers, 28 Ind. 1; Hilliard v. Goold, 34 N. H. 230; Manchester, &c. R. R. Co. v. Fisk, 33 id. 297.

CHAPTER XXXIII

FORFEITURE OF CHARTER.

SEC. 497. Can be claimed only by the Government.	SEC. 501. Restrictions upon Power of Legislature to forfeit Franchises.
498. Proceedings to forfeit Charter.	
499. Grounds of Forfeiture.	502. Other Modes of terminating Corporate Existence.
500. Effect of Forfeiture on the Powers and Franchises.	

SEC. 497. *Can be claimed only by the Government.* — Unless the statute expressly provides for the forfeiture of a charter at the suit of an individual, only the government can assert the right to have it forfeited; and the mere circumstance that the corporation has done acts which are a good ground for a forfeiture cannot be shown by individuals in collateral proceedings,¹ because the State may waive the forfeiture or enforce it, as it pleases;² and until a forfeiture has been declared, it is not deprived of any of its corporate powers or functions,³ and may enforce by action any claim in its favor,⁴ including subscriptions to its stock;⁵ nor does the fact that a cause of forfeiture exists operate as a defence to an action or even an indictment against it;⁶ and this has been held to be so, although there is a provision in the charter or general law providing that if the corporation shall do or omit to do a certain act, its charter shall, after a certain number of days, be *ipso facto* forfeited, and the period so limited has elapsed.⁷ A forfeiture can only be declared by a direct

¹ Taggart v. Western Md. R. R. Co., 24 Md. 563; Hamilton v. Annapolis, &c. R. R. Co., 1 Md. Ch. 107; Mississippi, &c. R. R. Co. v. Cross, 20 Ark. 443; Hammett v. Little Rock, &c. R. R. Co., 20 id. 204.

² Frost v. Frostburgh Coal Co., 24 How. (U. S.) 278.

³ Penobscot Boom Co. v. Lamson, 16 Me. 224.

⁴ Hughes v. Bank of Somerset, 5 Litt. (Ky.) 45; Mechanics Building Ass'n v. Stevens, 5 Duer (N. Y.), 676.

⁵ Buffalo, &c. R. R. Co. v. Cary, 26 N. Y. 75; Conn. & Pass. River R. R. Co. v. Bailey, 24 Vt. 465; Waterford, &c. Ry. Co. v. Dalbiac, 6 Exchq. 443.

⁶ Com. v. Worcester T. Co., 3 Pick. (Mass.) 227.

⁷ Atchafalaya Bank v. Dawson, 13 La. 497. But see Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524, where it was held that, where the language used shows the legislative intent was to make the continued existence of the corporation depend upon its compliance with some

judicial proceeding, and the question whether the company has done or omitted acts which amount to a forfeiture cannot be inquired into collaterally.¹

SEC. 498. **Proceedings to forfeit Charter.** — Unless the statute provides a special remedy for the forfeiture of a charter, there are two modes of judicial proceedings, to secure that result. One is by *scire facias*, which is a proper remedy when there is a legally existing body capable of acting, but which has abused its powers. The other is by *quo warranto*, or proceedings by information in the nature of *quo warranto*, which is the peculiar remedy when there is a corporate body *de facto* only, which has taken upon itself the capacity to act, when through some defect in its organization or otherwise it cannot legally exercise corporate powers; and this is a proper remedy, whether the corporation is *de jure* or *de facto*. In either case the proceedings must be commenced at the instance of the State; and an individual cannot institute such proceedings in his own name² unless authorized to do so by statute;³ and the question

requirement of the charter, in case of non-compliance the powers, rights, and franchises granted are forfeited and terminate; it is not simply a cause of forfeiture to be enforced in an action by the attorney-general. See also *Brooklyn, &c. R. R. Co., in re*, 72 N. Y. 245, to the same effect.

¹ *Selma, &c. R. R. Co. v. Tipton*, 5 Ala. 787; *Loring Valley Water Works v. San Francisco*, 22 Cal. 434; *Union Branch R. R. Co. v. East Tenn., &c. R. R. Co.*, 14 Ga. 327; *Duke v. Cahawba Nav. Co.*, 16 Ala. 372; *Thompson v. N. Y. & Harlem R. R. Co.*, 3 Sandf. Ch. 625; *Brookville & Greensburg Turnpike Co. v. McCarty*, 8 Ind. 392; *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Day v. Stetson*, 8 Me. 372; *Chesapeake, &c. Canal Co. v. Railroad Co.*, 4 G. & J. (Md.) 1; *Regents of University of Maryland v. Williams*, 9 id. 365; *Planters' Bank v. Bank of Alexandria*, 10 id. 346; *Hamilton v. Annapolis, &c. R. R. Co.*, 1 Md. Ch. Dec. 107; *Com. v. Union Ins. Co.*, 5 Mass. 230; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. (Mass.) 49; *Bayless v. Orne, Freem. Ch. (Miss.)* 173; *Grand Gulf Bank v. Archer*, 17 Miss. 151; *Bohannon v. Binns*, 31 Miss. 355; *Bank*

of Missouri v. Merchants' Bank of Baltimore, 10 Mo. 123; *Bank of Missouri v. Snelling*, 35 Mo. 190; *State v. Carr*, 5 N. H. 367; *Pierce v. Somersworth*, 10 id. 369; *State v. Fourth N. H. Turnpike Co.*, 15 id. 162; *Sewalls Falls Bridge v. Fisk*, 23 N. H. 171; *Buffalo, &c. R. R. Co. v. Cary*, 26 N. Y. 75; *Trustees of Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 23; *Webb v. Moler*, 8 Ohio, 548; *Receivers v. Renick*, 15 Ohio, 322; *Johnson v. Bently*, 16 id. 97; *Kishacoquillas, &c. T. Co. v. McConaby*, 16 S. & R. (Penn.) 140; *Irvine v. Lumbermen's Bank*, 2 W. & S. (Penn.) 190; *Conn. & Pass. R. R. Co. v. Bailey*, 24 Vt. 465; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352.

² *Com. v. United States Bank*, 2 Ashm. (Penn.) 249; *National Dock Co. v. Central R. R. Co.*, 32 N. J. Eq. 755; *People v. Rensselaer & S. R. R. Co.*, 15 Wend. (N. Y.) 113; *Kruffett v. Gt. Western R. R. Co.*, 25 Ill. 353; *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. (Md.) 1, 121; *State v. Boston, &c. R. R. Co.*, 25 Vt. 433; *People v. Northern R. R. Co.*, 42 N. Y. 217; *People v. Jackson, &c. R. R. Co.*, 9 Mich. 285.

³ *Com. v. Alleghany Bridge Co.*, 20

of forfeiture is purely one for a court of law,¹ and in the absence of a statute specially conferring such powers, a court of equity cannot declare a forfeiture.² The question whether leave to file an information for the forfeiture of a charter shall be granted or not is one which is addressed to the discretion of the court,³ upon motion of the attorney-general or other legal officer of the government.⁴ When the proceeding is brought to oust parties claiming to be a corporation, it should be brought against the individuals; as, if it is brought against the corporation, the information admits its existence as such.⁵

SEC. 499. Grounds of Forfeiture.—The charter of a corporation may be forfeited either for a misuser, or a nonuser of its franchises; and in determining the question, the same principles of forfeiture on failure to perform conditions which are applied to grants to individuals are to be applied to grants of corporate powers.⁶ The ingredient of a bad or corrupt motive is not necessary, but it is sufficient to uphold a forfeiture, if the performance of a condition is neglected or designedly omitted.⁷ But it is not every failure to perform the duties imposed upon a corporation that will work a forfeiture of its franchises.⁸ There must be some plain abuse of power by which the corporation fails to fulfil the design and purpose of its organization, and the acts of misuser or nonuser must relate to matters which are of the essence of the contract between the State and the corporation, *and they must be wilful and repeated.*⁹ There must be something more than accidental negligence, or excess of power, or mere mistake in the mode of exercising it. A single act of *wilful non-*

Penn. St. 185; *Baker v. Backus*, 32 Ill. 79; *Gaylord v. Fort Wayne, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 286; *Gilman v. Greenpoint Sugar Co.*, 4 Lans. (N. Y.) 482.

¹ *President, &c. v. Trenton Bridge Co.*, 13 N. J. Eq. 46.

² *State v. Merchants' Ins., &c. Co.*, 8 Humph. (Tenn.) 235; *Attorney-General v. Stevens*, 1 N. J. Eq. 369.

³ *Cole v. Dyer*, 29 Ga. 434; *Fall River Iron Works v. Old Colony, &c. R. R. Co.*, 5 Allen (Mass.), 221.

⁴ *State v. Southern Pacific R. R. Co.*, 24 Tex. 80.

⁵ *Mud Creek Draining Co. v. State*, 43 Ind. 236; *People v. Rensselaer, &c. R. R. Co.*, 15 Wend. (N. Y.) 118.

⁶ *Attorney-General v. Petersburg, &c. R. R. Co.*, 6 Ired. (N. C.) 456; *State v. Royalton, &c. T. Co.*, 11 Vt. 431; *Lombard v. Stearns*, 4 Cush. (Mass.) 60; *People v. Kingston, &c. T. Co.*, 23 Wend. (N. Y.) 193.

⁷ *People v. Kingston, &c. T. Co.*, *ante*.

⁸ *State v. Pawtuxet T. Co.*, 8 R. I. 182; *Harris v. Miss. Valley, &c. R. R. Co.*, 51 Miss. 602.

⁹ *Harris v. Miss. Valley R. R. Co.*, *ante*. In this case the failure of a railroad company to file a survey and map of its route in the Secretary of State's office within the period named in the charter, was not a sufficient ground of forfeiture.

feasance may be a ground of forfeiture ; but an isolated instance of nonfeasance, *not* wilfully committed or productive of mischievous consequences, is not sufficient. But where an incorporated turn-pike company sold a portion of its road to a municipal corporation, and thereafter neglected to repair that portion of it, it was held to amount to such a wilful act of nonuser as warranted a judicial decree forfeiting its charter.¹ In a New York case, in an action by the people against a corporation for its dissolution, the complaint alleged that the corporation was insolvent thirteen years before ; that it then surrendered its property to its creditors ; that it had ever since remained insolvent and neglected to pay its notes and other evidences of debt, and entirely suspended its ordinary and lawful business ; and that another corporation with the same general object had organized under the authority of the State, and was in actual operation in its place. The answer did not deny these facts, but attempted to excuse the alleged forfeiture. It was held that the facts of insolvency and suspension of business being admitted in the answer, the law admitted no excuse for the forfeiture, nor was any explanation available ; and there being no issue in the case to be determined by evidence, and no trial being necessary beyond an application of the law to the facts, the plaintiffs might apply to the court for judgment on the pleadings ; and that the case was a proper one for a judgment of forfeiture, dissolving the corporation and restraining defendants who were charged with usurping and attempting to exercise its franchise, from further exercising the same, and imposing a fine for its previous unlawful use.² So where a corporation in violation of the statute keeps its principal office out of the State, such violation of the law affords a good ground for the forfeiture of its charter. Thus, in a Wisconsin case,³ the statutes of Wisconsin relating to levy of attachment or execution upon shares of stockholders in corporations, to proceedings by or against corporations, and to the exercise of the visitorial powers of the State over them, as well as the act regulating the duties of the railway commissioner, and the general act concerning railway corporations, under which the defendant was organized, and other statutes, require, at least by necessary implication, that the principal place of business, the records, and the residence of the principal officers of

¹ *State v. Pawtuxet T. Co.*, 8 R. I. 182.

² *State v. Milwaukee, &c. R. R. Co.*,

³ *People v. Northern R. R. Co.*, 53 45 Wis. 579.
Barb. (N. Y.) 98.

private corporations created by the State shall be within the State, at least so far as may be necessary to give full effect to those statutes; and the charter of such a corporation may be adjudged forfeited for continued neglect of such duty.

Independently of statutes, it is the duty of a private corporation to keep its principal place of business, its records, and the residence of its officers so located as to render it accessible to the process and to the exercise of the visitatorial power of the State by which it is created; and a forfeiture may be adjudged for violation of this common-law obligation. An information showing that the principal office of the company is in New York; that its books and records have always been kept in that city; that none of its principal officers reside in Wisconsin; and that, by reason of these facts, it has been impossible to enforce an attachment against the shares of stockholders in actions brought in courts of Wisconsin in accordance with the State laws,—was held on demurrer to show sufficient ground for adjudging a forfeiture of the company's charter. It may be said that the persistent non-performance of the conditions of a charter or of the duties imposed by statutes applicable thereto, is *per se* a ground of forfeiture.¹ So the constant and wilful violation of fundamental conditions of the charter entitles the State to demand its forfeiture. A corporation, by the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for wilful misuser or nonuser. It is the tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated. It is a general principle that *where there has been a misuser, or a nonuser, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture.*² So the wilful acts and neglects of its officers are regarded as the acts and neglects of the corporation, and render the corporation liable to a dissolution.³ But an officer of a corporation cannot cause a forfeiture of the charter by a direct and palpable violation of the authority or instructions given him by the directors. If they give

¹ *People v. Kingston, &c. T. Co.*, 23 Wend. (N. Y.) 198.

² *Com. v. Commercial Bank of Pennsylvania*, 28 Penn. St. 383; *State v. New Orleans Gas-light and Banking Co.*, 2 Rob. (La.) 529.

³ *Bank Commissioners v. Bank of Buffalo*, 6 Paige (N. Y.), 497; *Ward v. Sea Ins. Co.*, 7 id. 294; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 31.

him no instructions against doing the illegal act, and he commits it in the course of his ordinary duties, it is their act doubtless; but if his act is in direct violation of express instructions from them, as well as of the charter, the corporation is not bound by his act, and the charter is not forfeited thereby. Neither does a departure from the directions given in the charter to the agents of the State, in the proceedings to organize the corporation, nor the neglect of the directors to sell the stock of a subscriber who has not paid the calls, as they are directed to do by the charter, afford a ground of forfeiture.¹ The mere omission of a corporation to exercise its powers does not, of itself, unconnected with other acts, in all cases work a forfeiture of its charter.²

But the charters of business corporations imply and require that they shall perform the business for which they were instituted; and a substantial suspension of business after its commencement, like an entire omission to commence business, is a violation of the charter, and gives the court power to appoint a receiver, and grant an injunction.³ A railway company which has completed its road between the *termini* named in the charter, or articles of association, forfeits its franchises by abandoning or ceasing to operate a part of its road.⁴ But a railroad company which has built a branch road under authority from the legislature, maintains it in good condition for use, uses it regularly and sufficiently for the transportation of freight, and is ready at all times to transport passengers and draw passenger-cars over it whenever any shall be offered to be transported or drawn, for a reasonable toll or compensation, does not forfeit its franchise by discontinuing, after public notice, the running of regular passenger trains over the branch railroad, when there is not sufficient passenger business at any rate of toll or fare to pay the expense of running them, by reason of the establishment, under authority of the legislature, of a competing line for the transportation of passengers over a horse-railroad.⁵ A reasonable and substantial performance of the conditions is all that is necessary to defeat a claim to a forfeiture.⁶

¹ *State v. Commercial Bank of Manchester*, 14 Miss. 218, 237.

² *Attorney-General v. Bank of Niagara, Hopk.* (N. Y.) 354; *Regents of University of Maryland v. Williams*, 9 G. & J. (Md.) 365.

³ *Ward v. Sea Ins. Co.*, 7 Paige

(N. Y.), 294; *Matter of Jackson Marine Ins. Co.*, 4 Sandf. Ch. (N. Y.) 559.

⁴ *People v. Albany, &c. R. R. Co.*, 24 N. Y. 261.

⁵ *Com. v. Fitchburg R. R. Co.*, 12 Gray (Mass.), 180.

⁶ *Thompson v. People*, 23 Wend.

When a cause of forfeiture has been established, the court cannot refuse to give a judgment of forfeiture simply because the forfeiture would injuriously affect public interests.¹ When a cause of forfeiture has once arisen, whether from nonfeasance, or otherwise, it cannot be legally atoned for by subsequent good behavior. Thus, putting a turnpike into good repair prior to the filing of an information to declare a forfeiture for want of repair, is no bar to the writ. Where a nonfeasance, as bad repair of a road, is made a cause of forfeiture by statute, if the default was occasioned by any irresistible cause, it lies with the defendants to show that fact.² The grounds of forfeiture of a charter may be waived by the legislature.³ Corporations are mere creatures of the law, and cannot violate the conditions upon which they are incorporated. But the law does not design that, for every imaginable breach, the charter of a corporation must be revoked. And it rests with the sovereign power, as a reserved right, to determine not only when proceedings of forfeiture shall be instituted, but also when violations of a charter are to be overlooked.⁴ An act of the legislature passed with notice of the grounds of forfeiture, which recognizes the corporation as still existing notwithstanding them, operates as a waiver of the forfeiture.⁵

SEC. 500. Effect of Forfeiture on the Powers and Franchises. —

After the charter of a corporation is declared forfeited, it can do no act by which rights can be acquired, nor can it maintain a suit to enforce those acquired during the continuance of the charter, unless its power and capacity for that purpose is continued by statute after its existence as a corporation is ended.⁶ Although a corporation is dissolved by a legal seizure or forfeiture of its franchises, those franchises are not thereby destroyed; they exist in the cus-

(N. Y.) 537; *People v. Kingston, &c. T. ick Female Seminary v. State*, 9 Gill Co., 23 Wend. (N. Y.) 193. And see (Md.), 379.
Commonwealth v. Alleghany Bridge Co., 20 Penn. St. 185.

¹ *State v. Penn., &c. Canal Co.*, 23 Ohio St. 121.

² *People v. Hillsdale & Chatham Turnpike Co.*, 23 Wend. (N. Y.) 254; *Com. v. Turnpike Co.*, 5 Cush. (Mass.) 509.

³ *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Chesapeake, &c. Canal Co. v. Ohio Railroad Co.*, 4 G. & J. (Md.) 1, 127; *State v. New Orleans Gas-light & Banking Co.*, 2 Rob. (La.) 529.

⁴ Board of Commissioners for Freder-

⁵ *Kishacoquillas, &c. Turnp. Co. v. McConahy*, 16 S. & R. (Penn.) 140;

McConahy v. Turnp. Co., 1 Penn. 426; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *State v. Bank of Charleston*, 2 McMull. (S. C.) 439; *State v. Mississippi, &c. R. R. Co.*, 20 Ark. 495; *People v. Fishkill, &c. Plank Road Co.*, 27 Barb. (N. Y.) 445; *Lumpkin v. Jones*, 1 Kelly (Ga.), 27; *Com. v. Union Fire, &c. Ins. Co.*, 5 Mass. 230.

⁶ *Saltmarsh v. Planters & Merchants' Bank of Mobile*, 17 Ala. 761.

tody of the State, and may be afterwards granted to the same or to other individuals.¹

SEC. 501. Restrictions upon Power of Legislature to forfeit Franchises. — Where the charter of a corporation, which the legislature has not reserved power to repeal, makes certain defaults only qualified cause of forfeiture, giving the corporation an opportunity to relieve itself from the forfeiture, a subsequent act, imposing an absolute forfeiture in case of such defaults, is void as to such corporation, because it would impair the obligation of the contract contained in the charter. The remedy is here a part of the contract.² Where the legislature is restricted by the constitution from the exercise of judicial power, it is not competent, without the consent of a corporation, to declare their franchise forfeited and the corporation abolished, and their property transferred to another corporation, without due process of law.³ Under a general statute, reserving to the legislature the right to amend or repeal all charters thereafter to be granted, with a proviso that they will not repeal a certain class of charters unless for some violation or other default, the legislative inquiry to ascertain if there has been a violation or other default is not "a judicial act" within the meaning of the clause of a bill of rights which forbids the legislature from exercising judicial acts.⁴ But a declaration of the forfeiture of a charter, in pursuance of a law accepted by the corporation, does not violate the constitution by impairing the obligation of contracts. The effect of a repeal and of a forfeiture is the same, so far as the rights of creditors are concerned. And a charter may be made liable to repeal by the legislature, by an amendment accepted by the corporation, reserving the power, notwithstanding the charter was before irrevocable. Persons must be regarded as having contracted with a corporation upon the hypothesis of the existence and possible exercise of the power to consent to the forfeiture of the charter upon certain defaults; but such consent, *it seems*, can only be given by all the stockholders.⁵

SEC. 502. Other Modes of terminating Corporate Existence. — The existence of a corporation may be terminated by a surrender of its

¹ *State Bank v. State*, 1 Blackf. (Ind.) 267. Williams, 9 G. & J. (Md.) 365; *Bruffett v. Great Western R. R. Co.*, 25 Ill.

² *Com. v. U. S. Bank*, 2 Ashm. (Penn.) 353.

³ *Aurora v. Laughery T. Co. v. Holt-*
house, 7 Ind. 59; *Powell v. Sammons*, 31

Ala. 552.

⁴ *Crease v. Babcock*, 23 Pick. (Mass.) 334.

⁵ *Mobile & Ohio R. R. Co. v. State*, 29 Ala. n. s. 573.

franchises to, and their acceptance by the State,¹ or by repeal of the charter where the rights of repeal is reserved. But if a corporation is established under a general law, the repeal of the law does not affect the right of corporations, formed under it before its repeal.² But a special charter may be repealed by a general law.³ A corporation is not dissolved by insolvency,⁴ the appointment of a receiver,⁵ or by a lease of the corporate property.⁶ But when it is consolidated with another under authority of law, or when under such authority it transfers its franchises, it is dissolved.⁷ But the question whether the old corporations become extinct or not, is one of legislative intent, to be gathered from the acts authorizing the consolidation.⁸

¹ *Lanman v. Lebanon Valley R. R. Co.*, 30 Penn. St. 42.

⁵ *Kincaid v. Dwinell*, 59 N. Y. 548.

² *Bewick v. Alpena Harbor Co.*, 39 Mich. 700; *Danworth v. Coolbaugh*, 5 Iowa, 300.

⁶ *Com. v. Central, &c. R. R. Co.*, 52 Penn. St. 506.

³ *State v. Comm'rs of Taxation*, 37 N. J. L. 228.

⁷ *Bishop v. Brainerd*, 28 Conn. 289; *Shields v. Ohio*, 94 U. S. 319.

⁴ *People v. Northern R. R. Co.*, 42 N. Y. 217.

⁸ *Central, &c. R. R. Co.*, 90 U. S. 665; *Atlantic, &c. R. R. Co. v. Georgia*, 98 U. S. 359; *Maine Central R. R. Co. v. Maine*, 96 U. S. 499.

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